AN APOLOGIE by Dr: Ric: Cozin,

FOR SVNDRIE PROCEEDINGS

by Iurisdiction Ecclesiasticall, of late times by some chalenged, and also diuersly by them impugned.

By which Apologie (in their seuerall due places) all the Reasons and Allegations set downe as well in a Treatise, as in certaine Notes (that goe from hand to hand) both against proceeding *ex Officio*, and against Oaths ministred to parties in causes criminall; are also examined and answered:

Vpon that occasion lately reuiewed, and much enlarged about the first priuate proiect, and now published, being diuided into three parts: the first part whereof chiefly sheweth what matters be incident to Ecclesiasticall conisance; and so allowed by Statutes and Common law: the second treateth (for the most part) of the two wayes of proceeding in causes Criminal, viz. by way of Accusation, & *ex officio Iudicis*: the third concerneth Oaths in generall, but more specially the lawfulnesse of such as be ministred touching suppposed offenses, either of themselues that sweare, or of their brethren:

Respectiuelie submitted to the graue iudgements of the reuerend *Iudges* and other Sages of the Common lawe: of Iudicious *Professors* of the *Canō* lawe: and of the right *reuerend Prelates* and other grounded Diuines in this Realme.

Whereunto (for the learneds sake, and for similitude of Argument and Iudgement) I haue presumed to adioine that right excellent and sound determination (concerning Oaths) which was made by M. LANCELOT ANDROVVES Doctor in *Diuinitie*, in the common Diuinitie Schoole of the *Vniuersitie of Cambridge* in *Iulie*, *An.* 1591.

Lex, iustitia; Iustitia, Reipub. basis.

Imprinted at London by the Deputies of CHRISTOPHER BARKER, Printer to the Queenes most excellent Maiestie.

1593.

THE GENERALL Preface, conteining the Occasion, and generall distribution of this Treatise following, before it was meant to make it publike.

THE indeuours of such disturbers as haue bene the chiefest staies of a further propagation of the Gospell, and the onely staines of her Maiesties happie reformation; haue rested most, in aduancing a new found discipline, & in discrediting the present gouernement Ecclesiasticall, by their speeches and writings. The later whereof they haue gone about; as well by impugning the callings and forme of gouernement Ecclesiasticall, (as if they were contrary to Gods word) as also by defacing the persons of the Gouernours, with vnchristian gibes, contumelies, and other indignities.

But these succeeding not to their wish, nor sorting to that effect they purposed; sundry of thē haue entred into, & pursued a more politike course. for by thēselues &

others (more ſimple) excited cunningly by them, they chalenge diuers receiued proceedings in Courts Eccleſiaſticall, not to bee iuſtifiable by lawe: pretending now their eſpeciall griefe to reſt herein; for that they are delt with and oppreſſed contrary to law, euen as if they did carie a principall and zealous care to haue all her Maieſties lawes dulie obſerued.

By whoſe frequent clamours, ſome very graue, wiſe and learned (no way affected to their other fanſies) either not being well informed of proceedings *Eccleſiaſticall*, or not weying (for want of leiſure) certain points ſeeming to bee doubtfully reported in the bookes of Common lawe, ſo throughly as their great learning therein doeth affoord: in a kind of commiſeration (for ſo I interprete it) towards ſome of thoſe who ſeeme diſtreſſed, and to be otherwiſe well meaning men; haue lately called into queſtion diuers proceedings Eccleſiaſtical, both for *matter*, and for circumſtance or *maner*; that they are contrary to the lawes of this Realme.

Yet all of them doe not iumpe in the ſelfe ſame opinions hereafter touched. For they are ſeuerally holden by ſeuerall men; the moſt whereof, are ſtood in by men of meaneſt place and reckoning in that ſtudie; and ſuch as are knowen to bee ouermuch addicted to factious innouations. But all the chalenges whatſoeuer (for contrarietie vnto the lawes of the realme only, ſo farre foorth as they are hitherto commen to knowledge) may fitly be reduced into this order & ſumme. They tende to the chalenging of proceedings Eccleſiaſticall, done either by thoſe who proceed by her Maieſties immediate Commiſſion, who are either *Iudges delegates* (dealing in matters onely betwixt partie and partie brought before them by appellation) or Com-

Commissioners in causes Ecclesiasticall (seruing especially for punishing of crimes & offences) or els such as be executed by those, who deale in *ordinary iurisdiction.*

The exceptions that touch the very matter and obiect of Ecclesiasticall iurisdiction, do in very deed by necessarie consequence tend, either to the whole taking away of the Ordinarie iurisdiction (as where it is affirmed, that *no Canon, constitution, nor ordinance prouinciall whatsoeuer, may now be put in vre, without her Maesties expresse assent first had to execute the same:*) or els do reach to the taking of it away but in part.

Those opinions that tend to the abridging of it but in some part; doe goe about it partly by way of excluding Ecclesiasticall Iudges, from the handling of certeine matters; (as by holding, that *none Ordinarie may cite any whomesoeuer, but in causes Testamentarie and Matrimoniall*: and that *no Layman ought to be cited or summoned to appeare before any Iudge Ecclesiasticall, to take an oath in any other cause, then Testamentarie or Matrimoniall:*) And partly by deriuing them from the conisance Ecclesiasticall vnto other Courts: (as that *the iudgement of heresie now lieth rather in the Common law, then in the law Ecclesiasticall:*) and some other of them (being defended by the same men that holde the next precedent opinion) doe tend both to the excluding of Courts Ecclesiasticall, and to the diuerting of such causes another way, as that *nothing now can be adiudged heresie, but according to the statute*, 1. Eliz. *cap.* 1.

As for the exceptions (pretended to be taken from the lawes of the Realme) against the circumstances, or *maner* of proceeding in courts Ecclesiasticall, they do either concerne such points as goe afore, and are preparatories to the suite (& such is this: that, *the Queenes*

Maieſtie cannot giue, nor any man receiue authoritie, to vſe any other proceſſe in matters Eccleſiaſticall, then by citation:) Or do touch the maner of entring into the ſuite, as that *an Eccleſiaſticall Court may not proceed without accuſation or preſentment*, and that *Lay men may not be cited* ex officio, *in any cauſe but Teſtamentarie or Matrimoniall:* Or they concerne the maner of handling, and proceeding in the ſuite, as that, *If a matter be duely preſented againſt a man, he may not be examined vpon his oath:* whereunto ſome (belike meaning to qualifie and diſtinguiſh it) do adde this, *viz. in a matter of incontinencie or ſuch cauſe*: and that, *no man is bound to declare any matter againſt another, except ſome be an accuſer:* Or do concerne the ſentence or iudgement of the Court Eccleſiaſticall, as that *by none Eccleſiaſticall authoritie, a man may be depriued of his benefice being his freeholde, being not endited, and no ſuite of partie offered againſt him*: Or els doe touch the execution of the iudgement: as that the 2. *Maieſtie cannot giue, nor any man may take authority of her, to vſe any coërtion for any matter Eccleſiaſticall, but excõmunications & ſuch like:* and that therefore *a man may not be puniſhed by impriſonment or fine, for or in any matter Eccleſiaſticall:* and laſtly, that *a man that ſtandeth aboue fortie dayes excommunicate, may no way be puniſhed, but vpon the writ* De excommunicato capiendo: *and that the ſaid writ may not be awarded, but vpon originall cauſe ariſing vpon ſome of the ten crimes touched in the ſtat.* 5.El.c.23.

But others that be indeed profeſſed dealers for an innouation in the Church (when they are conuented before authority) not only do moſt greedily take hold of theſe exceptions pretended to be taken from the Common law againſt iuriſdiction Eccleſiaſticall; but do allege alſo ſundry others, yet pretending to ground themſelues

themſelues for both, not alonely vpon the lawes of the realme (as thoſe do, of whom we hitherto haue ſpoken) but vpon Gods law alſo, the Ciuill, the Canon, or Eccleſiaſticall law, and vpon equitie and reaſon. Not becauſe they were perſuaded by the pregnancy of any of theſe ſo to thinke, but hauing embarked themſelues in that common quarrell, *viz.* to impugne the gouernment Eccleſiaſticall of this Realme, in all things to their vtmoſt: haue firſt (as is probable) entred into the opinions; and after haue ſought ſome colour to verniſh them ouer with, whereſoeuer they could hit of it. Which their exceptions peculiarly framed by the profeſſed *Innouatours*, and their owne proofs both for them, and for theſe alſo afore recited, (which were put into their heads by ſome Lawyers) ſhall (God willing) then be diſtributed & layd forth, when we come to the handling of them, becauſe other parts of this Treatiſe are more apt for that purpoſe, then this *generall Preface*.

Theſe opinions of late ringing ſundry times in mine eares, and ſeeming to me to be diuerſly miſtaken; I called to memorie (ſo nere as I could) what, and where I had read any thing touching them. Whereupon turning ſome books, and confuſedly noting what I found, I was more and more confirmed in my former conceits, ſufficient for mine owne perſuaſion.

Now becauſe you pretend not to haue trauelled in theſe kinde of queſtions, & haue ſo earneſtly importuned me to take ſome paines therein: I haue bin content for your owne onely priuate reading & ſatisfaction, to plot my ſimple conceits into this order as you ſee. For owing very much vnto you, & therefore not daring to deny you ſo ſmall a matter, I haue (with ỳ litle leaſure I could

could get) hazarded rather to haue want of iudgement in me, then lacke of good will, by you to be censured. Meaning in the first part of this Treatise to pursue the particular order heere aboue compriſed: ſauing that thoſe foure recited opinions which touch the circumſtances *of entring into a ſuite Eccleſiaſticall*, and *the maner of proceeding in it*, I ſhall be forced (contrarie to the naturall methode) to put after all the others, as requiring ſeuerall handling, and falling more fit in the ſecond and third partes of this Treatiſe.

THE

An Epiſtle to the Reader, conteyning the occaſion of the publication of this *Apologie*, with a generall delineation of two Treatiſes written againſt the ſcope of ſome part of the ſame.



Vpon occaſion touched in the Preface *going before (gentle Reader) I was about a yere & three quarters ſince, drawen to ſet downe this ſimple* Apologeticall diſcourſe *enſuing, albeit in very many places thereof nowe enlarged. Which Treatiſe (by him to whom it was addreſſed) being then imparted vnto certaine others of honour and qualitie, it is ſaide, that they were alſo deſirous to haue copies thereof, for ſome conſiderations to themſelues beſt knowen.*

The booke was ſomewhat long, and had many quotations, ſo that it coulde not conueniently in any ſhort time be written out truely and faire, for ſo many as ſeemed earneſtly to requeſt it. Hereupon it was then (in priuate ſort) committed to the preſſe, and fourtie copies, or there abouts were printed, without any purpoſe of further publiſhing.

It appeareth nowe, that neere about the ſame time, certaine Doctours *of the* Ciuill *lawe (required thereunto by ſome in authoritie) did agree vpon a briefe ſchedule, conteyning ſome groundes of miniſtring an oath* of office *in crimes puniſhable by* Ordinaries, *and Eccleſiaſticall Iuriſdiction: a matter referred but to priuate conſideration, and deſired for like ſatisfaction onely.*

This ſmall ſchedule was after deliuered foorth (by ſome to

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This ſmall ſchedule was after deliuered foorth (by ſome to

whoſe handes it came; as the report went) to be confuted by certaine Diuines *and* Ciuilians *of either* Vniuerſitie, *and by certaine profeſſing the* Common *lawe.*

Sure it is, that within foure moneths after, a Treatiſe *(ſaid to be penned againſt the purport and drift of that ſchedule) by ſundry (holden wiſe, & not vnlearned, to whoſe ſight the written copies thereof were credited) was moſt highly commended, and extolled.*

It ſeemed ſo precious, that copies thereof (though deſired) were made very rare: and not vouchſafed to the vulgar and meaner ſort, but kept tanquam Cereris myſteria. *So that almoſt a yeere (after knowledge of it had,) did paſſe; ere it happened to come to my poore handes: and that was by the meanes of a right* noble Counſellour, *who had alſo much adoc, to procure a copie thereof for himſelfe.*

That which came to my handes doeth carry this title, viz. A briefe Treatiſe of Oathes, exacted by Ordinaries and Eccleſiaſticall Iudges, to anſwere generally to all ſuch Articles or interrogatories, as pleaſeth them to propound: and of their forced and conſtreyned oathes *ex officio* : wherein is prooued, that the ſame are vnlawfull.

I was glad of this opportunitie offered; for I hoped to be inſtructed in ſome important point, that I had not afore conſidered of: and either to be aright perſwaded (whereof I am moſt deſirous) if I had miſtaken; or elſe be confirmed in my former opinion. For there was reaſon I ſhould ſo be, if in a booke drawne with ſo great aduiſe, by men of ſuch rare skill and dexteritie, and ſo well digeſted, I ſhould not finde demonſtratiue *arguments, euen to preſſe mine aſſent againſt the courſe (as I tooke it) of the lawes both* Ciuill *and* Eccleſiaſticall; *againſt the practice of all the other ſtates of* Chriſtendome; *and againſt apparent approbation thereof by*

Gods

Gods booke it ſelfe.

But when I had firſt curſorily runne that Treatiſe *ouer; I muſt confeſſe, I was partly drawne into cogitation, that I had not hitte vpon the right booke: becauſe ſuch is either my dulneſſe or preiudice (for I doe aſſure you, I will not be opiniatiue againſt that which I may diſcerne to be well grounded reaſon, or ſounde authoritie) that I ſtand yet as reſolutely perſwaded as afore, this piece of worke notwithſtãding.*

And albeit I wanted both fitte occaſion, and iudged it alſo (for the reaſons hereafter touched) not worthe the while to ſay any thing to the vnconcludency and imperfections, which I conceiued to bee in that Treatiſe; *yet was I neuertheleſſe (not long ſince) moued, by thoſe who may commaunde me, to take ſome time to anſwere it. Being ſignified withall from them vnto me, that it was otherwiſe fully meant, to put mine aforeſaide rawe diſcourſe of theſe matters (euen as it was) vnto print againe, to bee made publike.*

Whereupon, knowing this reſolution, and that διατριβὴ φορτικὸν *might perhappes be* ἀσύμφορος, *I condeſcended to aſſaye, whether I coulde as it were licke ouer my* diſcourſe *againe, into any more tolerable faſhion: not omitting withall, to anſwere the whole matter of the aforeſaid* Treatiſe *ſeeming to me any way pertinent; yet not in the ſame order as it is there ſet downe, but in ſeuerall places of my booke, as it falleth in moſt aptly, after the method, into which I had firſt plotted it.*

Of which whole Treatiſe, *I truſt I may (without offenſe) giue you a generall taſte, by this* Epiſtle. *Truely I neither doe knowe, nor haue heard, who were any of the Authors, or who was the* Enditer *of it. If therefore it ſhould happen that I did vſe ſome meaſure (though farre ſcanted) of that libertie of ſpeeche, which is vppe-mette, preſſed downe,*

and running ouer in the Treatiſour, *againſt many in place, (I doubt not) his betters, and of as great woorth and ſufficiencie as himſelfe euery way; I hope that I ſhall not (iuſtly) be noted, to be caried with ſharpneſſe of humour againſt any particular perſon; but to haue beene prouoked vnto a moderate, neceſſary, and generall defence. Albeit I purpoſe rather to waye, what is fitte for vs to ſpeake, then for him to heare.*

Vnto the whole matter *of the* Treatiſe, *theſe three ſeuerall pointes might haue ſufficed for a generall anſwere. The firſt is, that the ſtate of the controuerſie, or iſſue, is by him miſtaken: the ſecond concerneth his arguments; for he aſſumeth that as graunted, which is not; which in the ſchooles is called, a fallacie* petitionis principij: *the laſt and third, is his* ſophiſticall *anſwering, euen to ſuch obiections as him ſelfe frameth. For the firſt therefore; yee are to vnderſtand, that in the* Treatiſe *it ſelfe, this ſeemeth to be the generall iſſue by him tendered, againſt which he would argue: viz.* the forcing of oathes by Ordinaries and Iudges Eccleſiaſticall, generally to anſwere to all ſuch queſtions or interrogatories, as they ſhall demaund or miniſter, touching either the thoughts, words, or deedes of him, that is to depoſe. *Vnto which in the title is alſo added another challenge, for that they are* miniſtred of office, *by the Iudges. So that he conceiueth erroniouſly all proceeding* of office *to be onely in cauſes* Criminall; *and in this reſpect alone worthie to bee chalenged, becauſe it is done by the* Iudge, *without proſecution of a partie.*

Nowe if hee doe reaſon (as hee pretendeth) againſt ſome matter practiced by Iudges *and lawes* Eccleſiaſticall *in this* Realme; *then by charging them with exacting of oathes*, for men generally to anſwere vnto all their thoughtes, wordes, and deedes, that they ſhall be enquired

enquired of, *that I ſpeake but mildely; it is a very vntrue, and ſlanderous imputation, both to the men, and to the Lawe it ſelfe. If it were miſtaken by him through ignorance, yet was it ouer great raſhneſſe, thus to* ſpeake euill of ſuch as be in [1] authoritie, *eſpecially for matters hee perfectly* knoweth not. *But if it were wilfully done, then muſt I needs ſay, that he peruerted and wreſted the matter in controuerſie of ſet purpoſe, to make the men and whole calling odious; and thereby to giue the better tang (in ſome mens taſtes) vnto thoſe Cart-loads of contumelies, and ſpitefull* [2] *reproches, wherewith throughout the whole* Treatiſe, *it pleaſeth him to charge both them, and their proceedings; as (in part) ſhall by and by appeare.*

[1] Iudæ ep. V. 8. & 9.

[2] The Latines call this *calumniam*, the Grecians, συκοφαντίαν.

For the ſeconde point of the three: hee firſt defineth an oathe: then hee ſayeth it is a part of Gods worſhip: hee telleth the ende and inſtitution of oathes by Gods Lawe: and that they are either priuate or publicke: hee ſheweth the neceſſitie of it in ſome priuate ſuites: and what things are to be obſerued by him that taketh it, and what by the Magiſtrate, that giueth it: likewiſe hee ſetteth downe (yet but in part) certaine caſes, how an oathe is vſed in ſome Temporall *Courts; and how it ought to be vſed (as he ſaith) by the* Canon *Law. All which, I will not greatly now trauerſe with him. But hereupon hee inferreth, that the oathes* ex Officio *vſed in* Eccleſiaſtical *Courts, are againſt* Gods *Lawe,* Common *Lawe, and the* Canon *Lawe it ſelfe.*

So that if he minde to reaſon out of thoſe premiſſes, it muſt needes be gathered for him to this effect, viz.

In the Law of God, *in the* Common *and* Canon *Lawes, we finde oathes thus and thus preſcribed, and vſed:*

But the oathes miniſtred in Courtes Eccleſiaſticall *touching matters* Criminal, *are cõtrary to this preſcription and vſe:* Ergo. *They are contrary to thoſe three Lawes.*

I will omit that this reaſon concludeth not neceſſarily, being ex meris particularibus: *becauſe it might bee, that though ſundry othes by thoſe three Lawes were in deede of ſuch forme; neuertheleſſe other there may be alſo farre different; and yet both ſorts allowable.*

But for anſwere I ſay, that the Aſſumption, *or ſecond propoſition (which muſt be vnderſtoode) is by the* Treatiſer *not once mentioned, much leſſe vndertaken to be proued, but is taken vp by him as graunted, which in trueth is flatly by vs denied. For it ſhall bee prooued (God willing) that there is no ſuch* contrarietie *as is by him ſurmiſed, no nor great diuerſitie betwixt the othes there miniſtred, and thoſe, which* Scripture *mentioneth, or* Common *Lawe practiſeth.*

Now touching the laſt point of the three: Hee maketh it as a ſufficient anſwere vnto obiections that may be made, for aſſertion of ſuch othes as hee impugneth: if hee can but note any difference betwixt the things reſembled together: though ſuch diuerſitie bee not in the point, for which the compariſon is made: no, nor in any other point, that is materiall. As for example. If a man affirme, that Chriſtes *ſecond comming may bee compared to the comming of a thiefe in the night, meaning for the ſecreſie thereof, and want of expectation; ſhould hee well confute this compariſon, that woulde thus ſay: No Sir, that is vntrue, for there is a great diuerſitie betwixt their commings: becauſe* Chriſt *commeth to deale iuſtly, but a thiefe to doe vniuſtly? But to come neerer home: If I did argue thus,* viz. *The receiued vſe of the* Starre-Chamber *to deny men counſell, when they anſwere to* Interrogatories, *is not againſt the Rules of* Iuſtice; *therefore no cauſe is there, why the like approoued vſe in the* Chauncerie, *ſhould be counted againſt* Iuſtice: *I pray ye,*

ſhould

ſhould he reaſon ſoundly againſt it, that would anſwere it in this ſort: Oh Sir, there is a great diuerſitie betwixt thoſe two Courtes: *for the one proceedeth* Criminallie, *to inflict penalties for the* Queene, *the other but* Ciuillie *for priuate amendes in equitie, vnto the* partie? *Or if hee ſhoulde anſwere thus: The* Lordes *of the* Counſell *bee* Iudges *in the one, but not ſo in the other? Conſidering, that in all things (being not the ſame) there is diuerſitie; and yet a reaſon of compariſon is concludent; if there be no difference in the point, for which it is brought.*

If then the whole ſubſtance of that Treatiſe *ſhall bee founde vpon diſcuſſing, to labour of ſome of thoſe three infirmities; ſo that (as himſelfe affirmeth in the winding vp of all) he might truely ſay hee hath vſed but* fewe proofes: *I could therefore haue wiſhed, that hee had not ſhewed himſelfe as* Suffenus ſibũpſi, *by ſetting the Garland vpon his owne head, before the victorie; where hee telleth vs, that albeit his* proofes by him brought be fewe, yet (*ſaith he*) they are effectuall. *And thus much for the matter of that* Treatiſe.

Now let vs here alſo conſider the maner of penning, and the briefe of the reſt of his vnneceſſarie wordes, which are wholly beſides the matter. For the enditing, *ſurely I doe eſteeme it (for my part) to be a very commendable, eaſie, and flowing (if not ouerflowing) ſtile. Yet if I may be pardoned to ſpeake freely, that which I thinke, truely it runneth altogether vpon an haughtie, comptrolling, contemptuous, diſdainefull, and ſalte minerall veyne, as may appeare by a taſte of ſome particulars, not vnfitte to bee opened; which for order ſake, I will contriue into theſe fiue ſeuerall heades: viz. 1. Of his diſcourteous and opprobrious termes vſed againſt ſundrye particular perſons and callings: 2. His couert reproching and wounding of all* Eccle-

ſiaſticall Iudges *through the ſides of* Papiſts, *for their raging againſt Subiects, and treacherie to their* Soueraignes, *in former times:* 3. *His reuiling the proceedings* Eccleſiaſticall, *which he there impugneth:* 4. *His vntrue imputations and ſlander of theſe proceedings: And laſtly, the pretended impieties ſuppoſed thereby to be committed, with the dangers and penalties, that hee chargeth all ſuch to haue incurred, which haue bene dealers in ſuch practiſe of* Eccleſiaſticall Iuriſdiction.

For the firſt of theſe: as where hee termeth all that practiſe that part of Eccleſiaſticall Iuriſdiction (*whether* Ordinaries *or* Commiſſioners) *by the names of* Inquiſitors, rough and rigorous exactors, and offenſiue butchers: *Chargeth them* to cloake and ſhadowe foule matters vnder glorious and painted gloſſes, beautifull ſhewes, and fained pretenſes: *that of their* Iudiciall Courtes and Conſiſtories, *this ſaying of the* Poet *is verified, viz.*

Victa iacet pietas, & tergo cæde madentes
Vltima cœleſtûm terras Aſtræa reliquit: *As if they had there murdered or vnlawfully put ſome to death.*

Where hee alſo ſaith, that Ordinaries challenge or aſſume to themſelues the goodly name and title of Spirituall men: *that they are men* to whome the ſauour of gaine is ſweete, *and therefore ſayeth of them,* Auro loquente tacendum eſt.

Thoſe Doctors *alſo which by commandement do* (*as afore*) *ſeeke to iuſtifie the courſe that he oppugneth, he calleth* (*thorowe contempt*) Engliſh Doctours: *a terme vſually faſtened but vpon ſuch, as beare the name of learned, and yet beſides* Engliſh (*their mother tongue*) *perhappes vnderſtand none other language at all: yet the meaneſt of ſuch* Doctors *can tell, that a* Publican *differeth from a* Collectour, *and that* regula Iuris *ſignifieth not an* example

or precedent, at both which he ſtumbleth. He pleaſantly alſo (like a Sennor Soldado) ſorteth nine of them by rankes, into more then two quaternions, as the ſouldiers which kept S. Peter were ſorted: as if through their baſeneſſe, a quaternion of them were not woorthie to be laid in ballance with a meſſe of ſuch as himſelfe is; or as though in a braue reſolution of his owne ſingle valour, he valued them by dozzens together, and durſt encounter them all at once, like as the ſingle Spaniard doth, with ſo many naked and contemptible Barbarians.

He termeth them alſo (in ſcorne) Learned Canoniſts: as if he would inſinuate, that the litle skill they haue, were in the Canon lawe onely, which he nameth the Popes Teſtament: and as if their degrees of ſchooles were taken in that profeſsion. Whereas it is well knowen, that their profeſsion and degree, is in the Ciuill lawes: a lawe being (for the equitie and wiſedome thereof) by the ſpace of ſundrie quaternions of hundreths of yeeres, the common lawe of all the Ciuill nations of the world ſaue one. What he eſteemeth of it, greatly skilleth not, but Tullie, a man more wiſe then he, doeth giue it exceeding great commendations. And all the Chriſtian worlde (ſauing our ſelues) are not deſtitute of reaſon, for well eſteeming and practiſing of it. For the courſe of thoſe Doctours education, it hath beene in the liberall ſciences, in the languages called learned, and perhaps in ſuch of the vulgar alſo, as be of any commendable note, and in other ſortes of good learning. Wherein if they haue accordingly profited, their employment (happely) may bee many wayes (thereby) as behoofefull to the ſeruice of their Countrey, as that which ſome call learning, is beneficiall and gainefull to themſelues.

Likewiſe the poore Apparitors that ſerue in Eccleſiaſticall Courtes, he calleth them, their hunting Spaniels,

malepert Apparitours, Meſſengers and Purſuiuants: *men though in meane place, and but miniſteriall qualitie, yet as neceſſary to be had in thoſe Courtes, as* Errand-bailifs *be for* Temporall.

To come to the ſecond; may it be denied, that the matters wherewith he reprocheth the Popiſh prelates, *of former times, are bent* per obliquum, *through their ſides to wound all the* Reuerend fathers, *and others nowe liuing? who (for proceeding* of Office *againſt ſome of his darlings) are fallen as deepely into his indignation. For haue theſe ſharpe biting termes bene beſtowed vpon any of their late* Predeceſſours, *or vpon them, till of late yeeres, that certaine diſordered perſons ioyning (though in other reſpectes) with the* Papiſtes, *to oppugne this Church, haue bene dealt with in the ſame courſe, that* Papiſts *are, and were from the beginning of* her Maieſties *reigne, before theſe other ſprung vp? If this were not his meaning, for what ende is almoſt halfe his* Treatiſe *ſpent by way of Inuectiue againſt the* Popiſh *Prelates? So that (no doubt) hee meant to lay vpon the preſent* Iudges Eccleſiaſticall *the reproches of them, whoſe ſteppes hee chargeth them to followe, in that* this courſe of proceeding was (*if wee may truſt him vpon his bare worde*) brought in by the practice of the Popiſh Cleargie: *And therefore hee ſayeth, that* Biſhops nowe practice Antichriſtian decrees, and Popiſh Canons, the very heades of that Helliſh *Cerberus* of Rome, and the ſynewes of his tyrannicall authoritie: *For elſe this were but running of riot, and vaine barking againſt the Moone.*

Of this ſort are thoſe his other ſpeeches alſo, viz. *that* the Papiſticall Cleargie moſt irreligiouſly practiſed the ſame: *that* they finding it a fitte inſtrument to mainteine their Romiſh Hierarchie, and to tyrannize ouer

the conſciences of good men, moſt impiouſly violating the lawes both of God & man, impoſed this maner of corrupt oath vpon the people: *that* they were far more cruell then *Claudius* or *Caligula*: mad men, greedie & deuouring Wolues: *that* they fed (with delight) their fierce and cruell mindes: *that* they tyrannized in cruell maner: *that* they forced men with rough and rigorous termes of diſgrace & reproch: *that* they were mercileſſe magiſtrates vſing ſudden and raging committance: *that* they promiſed in *verbo ſacerdotali*, if that be ought worth: *and he calleth them* vnbridled Clergie men, Phariſaicall Clergie men, vniuſt & lawleſſe men, with their bad practices and fond intentions: mercileſſe Ordinaries, with their extraordinarie and lawleſſe power: *their actions* cruell and accurſed dealings of Barbarous bloudy biſhops, murtherous mindes and intollerable iniquitie of biſhops, vſing a Barbarous courſe of inquiſition. *He inueigheth alſo at large, againſt their* hypocriſie & feined holineſſe: *againſt their* temporall poſſeſſions, as the nurſes of pride, preſumption, and vaine pompe of the world. *Truly if this kinde of miſlikers, had that litle of temporalties which is ſtill left, how hũble they would be may iuſtly be doubted: but I durſt vndertake for them, that they will vſe no great* pompe *in hoſpitalitie, nor in any thing els, ſauing in words. Likewiſe againſt their* ambition: *for he affirmeth, that* three Archb. inforced aboue the kings of the land: *againſt* vſurping & encroching vpon the kinges iuriſdiction by Popiſh prelates, to bring cauſes to their coſtly and lingering conſiſtories: *againſt* bringing in (by them) of forrein decrees, corrupt canons, and ceremonies of the accurſed See of Rome: *againſt their* claiming of exemption from taxes impoſed by any other whomſoeuer, then by the

Popes authority: *and againſt* certeine clergie men, *that (in former times)* oppoſed themſelues (with great obſtinacie) againſt the paiment of a ſubſidie: *as if lay men had not done (rebelliouſly) as much, as theſe did obſtinately: Againſt* haughtie *Hugh* biſhop of *Lincolne*, who (*hee ſaith*) as a luſty champion of that irregular confederacy drew out his woodden dagger of excommunication, againſt the kinges Iudges: *againſt* a biſhop of *Wincheſter*, who was outlawed for a wilfull murther, and a while refuſed the iudgement of the kings law: *againſt the* Popes collectour who conuented the vicar of *Saltaſh* afore himſelfe, for breach of an othe giuen for ſtrength of a bond: *againſt the* Hoſpitallers and Templers, who drew the kings ſubiects into ſuite, before the conſeruatour of their priuileges: *And againſt* the proud prelate cardinall *Woolſeys* court legatine; and both his and *Nixe* the blinde biſhop of *Norwich* his falling into *præmunire*, for encroching vpon the kings iuriſdiction: *Adding alſo a ſlie ſurmiſe of ſome other things (in the times of* Poperie) *to haue bene vſed, which he doth but vainely imagine, to be now practiſed by* Commiſſioners Eccleſiaſticall. *So that by this tricke of cunning conueyance, he would induce and draw on his affectionate readers to beleeue, the ſame to be now in all* biſhops *preſent, which was blame woorthie in any of their* predeceſſours. *For his fauourers may not iudge that ſuch a man as he, would wander ſo farre wide (as he doth) from his purpoſe: belike if theſe now do but any one action (though neuer ſo iuſtifiable) which the* Papiſts *haue done in times paſt, they ſhall carry all the cõtumelies, which they (in any other reſpects) haue either worthely, or vnworthely deſerued. Whether this be a direct* Chriſtian *courſe, euery one that is in any place of iuſtice ſhall moſt ſincerely diſcerne; which will but conſider with himſelfe,*

ſelfe, how vnequall he would iudge it to bee, to haue his owne honeſtie, diſcretion, loialtie, and religion meaſured and eſteemed of, according to the actions of the worſt men that euer afore occupied the ſame place that he now doeth.

Vnto the third point (which is reuiling of proceedings Eccleſiaſticall *(in this behalfe) all ſuch ſpeeches of his, as theſe following doe appertaine: of the whole* Canon *lawe indiſtinctlie and generally he ſpeaketh thus: that* they be lawes and ordinances contumelious againſt God, iniurious to Magiſtrates, and eſpecially eſtabliſhed to maintaine Antichriſtian tyrannie: *Of an* Oath *of* purgation, *or an oath miniſtred to anſwere (in ſome caſes) vnto* Articles *and* interrogatories criminall, *he ſaieth,* It is againſt law and reaſon; an intollerable error and diſorder: a fowle and great abuſe: hard and vniuſt dealing: vndiſcreete, vniuſt, and vnlawfull forcing: offenſiue proceeding: vſurped officious power, and licentious pleaſure, contrarie to all due courſe of Iuſtice: a violent courſe of iniurious inquiſition, examination, and of wreſted oaths: a lawleſſe proceeding which the Iuſtice of the land deteſteth: that they be vniuſt oaths, and full of iniquitie: ſtrange oaths & ſtrong purgations, not healthfull but hurtful: poiſoning purgations, giuen for preſeruatiues: Catholique oaths: a vicious and lawleſſe inquiſition: and laſtly, a prophane, and more then heatheniſh Inquiſition.

The fourth point concerneth his vntrue and ſlanderous accuſations of their proceedings, who be Iudges Eccleſiaſtical: *as where he ſaieth,* that ſuch generall oaths *(viz. as afore hath bene touched, when I ſpake of the iſſue miſtaken,)* are exacted, none accuſation, ſuite, lawfull information, preſentment or inditement iudiciallie preceding: *that the Eccleſiaſticall Commiſſioners,* terme themſelues high

and ſupreme Commiſſioners: *that it is* exacted by euery eccleſiaſticall Iudge to ſatiſfie his iealous ſuſpicion of any crime, to appoſe by othe, and compell men to their purgation, or vpon euery bare ſurmiſe and vncertaine rumour: *that* by the like reaſon (*vnto the practiſe of this othe*) there ſhould bee erected a court of Inquiſition, more then Spaniſh, to ſift and ranſacke (by othe) moſt ſecret thoughts: *That the Interrogatories vſed by Eccleſiaſticall Iudges are not certaine, but* doe fooliſhly wander at the doubtfull will of a ſlie and ſubtill appoſer: *that* hauing ſnared the ſillie ſubiect, they doe either (againſt lawe) enforce him to accuſe himſelfe of his moſt ſecrete thoughts; or contrarie to Chriſtian charitie, yea humanitie, conſtraine him to anſwere againſt his naturall parents, &c. *And that in defence of theſe abuſes*, diuers euen of the learned ſorte, doe great violence to the Statute, *1. Eliz. cap. 1.* wreſting the ſame to a wrong ſenſe: *all which are verie calumnious accuſations.*

The fifth and laſt point of his lauiſh and looſe ſpeeches; concerneth the impieties, dangers and penalties, wherewith he chargeth all that haue delt in any ſuch Eccleſiaſtical cauſe. As firſt, that it is a great and prophane abuſe of the holie name and maieſtie of God: that Gods ſacred inſtitution is thereby greatlie peruerted: that it is hurtful to the Church and common weale: *that it is* a great indignitie to the Crowne: *that* they vſurpe coniſance of pleas: *that* they doe no leſſe then *Thorpe* ſometime chiefe Iuſtice did, who (as much as in him lay) broke the oath which the king is bound to keepe towardes the people: *that* they are violaters of the king, and iniurious dealers againſt his Regalitie, Crowne and kingdome: nay rather laie violent handes on him, impugne

pugne his royall throne and ſcepter contrarie to the policie, Iuſtice, lawes, cuſtomes, and freedomes of this kingdome; yea contrarie to the lawe of God it ſelfe: *that hereby* they impugne the royall prerogatiues vnited to the Crowne, with the breach of their owne oaths; eſpeciallie if they haue taken the oath for the maintenance of the ſupremacie royall, *whereof hee maketh ſome doubt (as it ſeemeth) and* aduiſeth *them of this danger*, as a [1] welwiller: *that it is* playne extortion and wrong vnto the partie. *And laſtlie, that* they are all offenders, and doe incurre the forfaiture of the penall lawes of Premunire.

[1] Scilicet.

Seeing then his wordes of this matter bee ſo bigge, his termes ſo biting, his ſpeeches ſo confident and peremptorie, and his accuſations ſo grieuous: Is there not (in defence of Iuſtice and of ſo many good and great learned men in ſeuerall profeſſions) great occaſion offered to haue it examined; whether the force and weight of his reaſons will beare out this copious harueſt, and hote raging feuer of wordes, or whether theſe wordes were but vſed becauſe matter wanted? What weight and moment his reaſons are of, is not of this place particularlie to diſcuſſe, but ſhall bee reſerued to the ſeuerall partes of the Diſcourſe *following. And I will not ſtriue by bare wordes to returne theſe of-ſcowrings of a fowle mouth and a defiled penne vpon him agayne; further then muſt needes cleaue faſt to himſelfe, the Authour of them: when they ſhall (by reaſon) bee wiped off from the perſons charged, and ſo are to rebound backe, vpon their firſt owner.*

And to giue you an inckling (in the meane time) that it is not otherwiſe like, then to fall out ſo: It ſhall not bee amiſſe, a little to conſider how gingerlie ſometimes hee treadeth in this matter: and how here and there himſelfe minceth

minceth and qualifieth the ſtate of the controuerſie, as it were waiuing his firſt iſſue; notwithſtanding all thoſe his former high lookes and braue termes. For firſt he granteth, that diuers euen of the learned ſort, doe hold, and that verie confidently, (*meaning hereby as I take it, ſundrie profeſſors of the* Common *lawe*) *that theſe proceedings which he impugneth, are warranted by the Statute,* 1. Eliz. cap. 1. *and can he (whoſoeuer he be for a man) ſhewing no more, yet ſee more herein then ſo many of the* learned ſort *can, that be of an other iudgement?*

And though he exclaime (as yee haue heard) mightilie, that this kind of oath is contrarie, and a ſtranger to the lawes, Iuſtice, and policie of this Realme; *yet in the verie cloſing vp of his* treatiſe, *hauing ſayd, that* it was neuer put in vre or vſe by any Ciuill magiſtrate of this land: *by the ſtrength of trueth is forced to adde thereunto this exception: viz.* but as it is corruptly crept in amongſt other abuſes, by the ſiniſter practiſes and pretenſes of the Romiſh prelates: *thereby imploying, that yet it hath bene vſed of long time* by the Ciuill policie and magiſtrates of this Realme: *noting them withall, I know not with what* other abuſes, *as being ouerrought, which belike they alſo ſhall heare of, as his leiſure will permit him, if they pleaſe him not in the meane time the better.*

Likewiſe, going about to anſwere the obiection that may be made, for iuſtifying of this othe by the like approoued courſe in the Starre-chamber: *he vſeth theſe wordes as a reaſon of his allowance of ſuch proceeding there: viz.* The Starre-chamber requireth an anſwere to matter in fact, done either to the iniurie of a priuate perſon, or hurt to the publike State. *Then (by like reaſon) if* Iudges *and* Commiſſioners Eccleſiaſticall, ſhall but require this oath to anſwere matter in facte (*as in very trueth they doe none*

other-

otherwiſe) done to the hurt of the publike State, *then is the cauſe in controuerſie thus farre yeelded vp by him. But can he* (*in deed*) *thinke it reaſonable and iuſt, to exact ſuch oath for puniſhment of an iniurie done but to a priuate perſon in his temporall goods, or ſuch like: and ſhall it bee in his iudgement vniuſt and vnreaſonable to be exacted for diſcouerie and reſtraint of ſuch enormities, which cannot be denied to be preiudiciall both to the ſtate of the Church & Common weale, wherein Iudges Eccleſiaſticall moſt vſually doe practiſe it?* Vltrà non deſidero; habemus quaſi confitentem reum.

In another place of the Treatiſe, *he ſharpely inueieth, for that the* Commiſſioners Eccleſiaſticall, *miniſter the oath before the partie be permitted to haue the Articles. Now in his ſhewing of differences betwixt the proceedings by* Commiſſioners eccleſiaſticall *and the* Starre-chamber, *one of them is this; that the defendant there, hath the copie of the* bill of Information *to anſwere by his counſell, ere hee take his othe for the trueth of it: yet hee reſtraineth it thus, viz.* So the Information in the Starre-chamber bee not made *Ore tenus: ſo that it muſt hereupon needes be yeelded that at ſometime, and vpon ſome occaſion it may bee: and therefore it is not* ſimplie vniuſt, *to giue the oath before the defendant haue a copie: nor for him to be debarred from counſell, when he anſwereth but* interrogatories *of his owne fact or knowledge. For* (*in deed*) *the defendant in the* Starre-chamber *is not allowed counſel, whē he anſwereth to* Interrogatories, *ſorted into* Articles, *but only is allowed counſel for the maner of framing of his anſwere to the* Bill *into due forme of law: the Counſeller not aduiſing him in the matters of fact, leaſt happily he draw the defendant into periurie. For it were very vnreaſonable, that counſell ſhould direct him in the matter, and as it were to ſay vntò him:* anſwere not this thus, though it be true; for then you are like to be grie-

uouſlie puniſhed. *Nay rather, as a writer in the* Ciuill *law aduiſeth: the counſell (euen to the* bill of Information) *ought to tell the defendant to this effect:* Si hoc modo reſpondeas, perdes quidem cauſam: ſed ſi aliter quàm veritas ſe habet, perdes animam.

Furthermore, in one place where he reprehendeth forced and conſtrained oaths; *hee limiteth his meaning by theſe words, viz.* in that generall maner: *which is, as afore he had ſurmiſed: viz.* to ſift generally all a mans thoughts, words and deeds, and that without any accuſation, or complaint precedent: *ſo that it is not ſimply the vrging of them to take oath in a* criminall *cauſe which grieues him, or vs to be condemned: but to doe it* in that generall maner, *for all thoughts, wordes and deeds. If then no ſuch matter be (in very trueth) euer practiſed, the man (it ſeemeth) will eaſilie bee reconciled againe vnto them, whom hee ſo eagerlie afore ſnatched at, and tooke vp.*

Laſtly, in one part of the Treatiſe *hee ſpeaketh in deed againſt* oaths in criminall cauſes: *but it is with this taxatiue reſtraint:* eſpeciallie *(ſaieth he)* in cauſes of life and death, contrarie to the lawes of this realme: *ſo that if it be not miniſtred in any* cauſe of life and death, *no, nor yet in any cauſe of mutilation of limme (as in very trueth it is not now by any court* eccleſiaſtical, *a thing moſt notorious) then there is no cauſe of offenſe giuen, either to the lawes of the realme, or vnto himſelf. And therfore for this time the* Treatiſer, *and thoſe which exerciſe* Iuriſdiction eccleſiaſticall, *may ſeeme (in ſome broken maner) to bee growen againe to a pretie kind of* pacification; *hold as wel, & as long as it ſhall.*

But there is another partie alſo, that perhaps will venture to rip vp agayne the ſeames of this greene peace, if hee may not (in ſome ſort) bee ſatiſfied. For there came vnto mine handes a good while after the former Treatiſe, certaine briefe

Notes

Notes (*without discourse*) *that are deliuered abroad into many hands by writing; being commended to be gathered by a man of great reading, and iudgement in* Diuinitie, I awe, *and in what not? It beareth this title,* Notes to prooue the proceeding *ex Officio,* and the oath and subscription which are now required, to be against the word of God, the ancient Fathers, and Canons of the Church, and the lawes, liberties, and customes of the realme of England: the proceeding of Office, and the oath required, *though hee telleth not how he conceiues it to bee required, (as the* Treatiser *did) doe both fall into this disputation, which we haue in hand. As for the* subscription; *(vpon other occasion) that may hereafter elsewhere be debated. The seuerall points which (in respect of the two former) hee handleth, are by himselfe distributed and sorted into these seuerall heads: viz.* First, testimonies out of ancient Fathers, that do mislike the proceeding *ex Officio,* and oath now vsed: *Secondly,* English Martyrs that haue refused and misliked the oath now vsed: Thirdly, the proceeding against heretikes in Englād, without exacting an oath &c: Fourthlie, the Canon lawe teaching Inquisition and proceeding *ex officio* by oath. Fiftly, another order of proceeding, but yet in *causa fidei,* and not otherwise. Sixtlie, the bishops proceedings contrarie. Seuenthly, the lawes of England. Eightlie, the maner of the reuocation of the proceeding *ex officio* in king *Henry* the 8. time. Ninthly, the maner of debating of that cause in those dayes. 10. Sir *Thomas Mores* reasons for maintenance of proceeding *ex Officio* & the oath, with summarie answeres to them. 11. And lastly, Inconueniences which come by the vse *ex Officio,* contrary to the common lawe. *For proofe of some of which (especially the first) he is so plentifull in quotation onely of places, (without*

rehearſing their ſayings) *out of the ancient* Fathers, counſels, &c. *that for mine owne part, I muſt confeſſe that vpon the firſt view of their names in his* moſter booke, *I was greatly aſtoniſhed, leaſt I had too reſolutelie defended a matter againſt ſuch an armie of ancient* Fathers, *and as it were againſt the generall conſent of the olde* Primitiue Church; *from which I meane not* (*God willing*) *eaſilie or raſhlie to ſwarue. But when I had approched neerer, I well diſcerned this my feare to be all in vayne, in that they had neither banner diſplaied, nor weapons bent againſt this cauſe, but rather againſt the faces of the aduerſaries thereof: as may plainelie appeare in the ſeuerall & opportune places of this ſimple* Diſcourſe *enſuing.*

I may well reſemble this dealing of the Note-gatherer *vnto yong ſetters vp in* London, *as* Apothecaries *and ſuch like, that be not at firſt well ſtored with ſtuffe: who to furniſh vp their ſhoppes vnto the beſt ſhewe, are woont oftentimes to embelliſh them with good numbers of painted gallie pots, boxes and glaſſes, intituled on the outſide* (*euen with golden letters ſometimes*) *of ſuch precious Waters, Oyles, Simples, and other drugges of medicine, which they neuer ſmelt of, becauſe ſuch neuer came within them. And perhaps I ſhould ſaue him from ſuſpicion of a greater fault,* (*that is eyther want of iudgement, or of wilfull peruerting of the* ancient Fathers) *if I ſhould freelie deliuer my conceite in this behalfe: which is, that his leiſure ſerued him not, to looke what was in deede contained in thoſe places, which there hee quoteth: but that hee did ſet them downe* (*vpon truſt*) *out of the* Pies *or* Indices *of the ſayd ſeuerall bookes, whereſoeuer the bare wordes of* Inquiſition, *of* Accuſing, *of* Oath, *or of* Swearing *was found. For I dare auowe, that hee which ſhal read thē in the* Authors *themſelues, will iudge, that many of them were gathered together in condemnatiō of taking*

any

any oath at all, (an errour holden by the Anabaptists*) albeit being truely vnderstood according to the circumstances, the places serue neither the one turne nor the other) rather then that by any colour, they may be wrested to speake either against* oathes *ministred in causes* criminall, *or against proceeding by* Iudges of Office.

Let thus much therefore (if it be not too much) suffice, to haue deliuered in some generalitie, touching the said Treatise *and* Notes. *both which are vndertaken, for the whole substance of them, to be here and there answered, in this simple discourse ensuing.*

THE CONTENTS OF the seuerall Chapters of the *First part.*

1 THat a seuerall royall assent is not required to the executing of euery particular Canon.

2 The particular distribution of all other causes to be proued to be of Ecclesiasticall conusance, besides Testamentarie or Matrimoniall, with a discourse of bishops certificates against persons excommunicated, being a speciall point of their voluntarie iurisdiction, where there is no partie which prosecuteth.

3 That matters in the former chapter adioyned to Testamentarie & Matrimoniall causes (though properly they be not of Testament or Matrimony) are of Eccleſiasticall conusance, and how farre.

4 Generall proofs out of statutes, that sundry other causes besides Testamentarie or Matrimoniall, are of Eccleſiasticall conusance.

5 That suites for title of Benefices vpon voidance or spoliation: likewise that suites for tithes, oblations, mortuaries, &c. for pensions, procurations, &c. are of Eccleſiasticall iurisdiction, is prooued by statutes especially.

6 That suites for right of tithes belong to the Eccleſiasticall iurisdiction, and how farre, is shewed out of the books and reports of the Common law: so of places of buriall and Churchyardes: and of pensions, mortuaries, oblations, &c.

7 Of right to haue a Curate: and of contributions to reparations, and to other things required in Churches.

8 Proofes in generall, that sundry crimes and offences are punishable by Eccleſiasticall iurisdiction: and namely idolatrie, heresie, periurie, or *laesio fidei*, and how farre the last of these is there to be corrected: also of disturbance of diuine seruice, or not frequenting of it, and neglect of the Sacraments.

9 That Simony, Vsury, defamation or slander, beating of a Clerke, sacriledge, brawling or fighting in Church or Churchyarde, dilapidations or waste of an Ecclesiasticall liuing, and all incontinency are punishable by ecclesiasticall authority, and how farre.

10 That the matters and crimes here reckoned, be also of ecclesiasticall iurisdiction: and proofes that any subiects, lay or other, may be cited in any cause ecclesiasticall.

11 That lay men may be cited and vrged to take oathes in other causes, then Testamentarie or Matrimoniall.

12 The grounds of the two next former opinions examined and confuted.

13 That iudgement of heresie still remaineth (at the Common law) in iudges ecclesiasticall: and that the proviso touching heresie, in the statute 1. *Eliz. cap.* 1. is onely spoken of ecclesiasticall commissioners thereby authorised.

14 That by the statute, her Maiestie may commit authoritie, and they may take and vse for ecclesiasticall causes, attachments, imprisonments, and fines.

15 That an ecclesiasticall person may be deprived of his benefice without enditement or prosecution of partie.

16 That after forue dayes, an excommunicate person may be otherwise punished then vpon the writ *De excomm. capiendo*; and that the said writ may and ought to be awarded, vpon contempts rising on other causes ecclesiasticall then any of those ten crimes that be mentioned in the stat. 5. *Eliz. cap.* 23.

17 Of a prohibition, what it is: where it lieth not, and where it doth: and how it ceaseth by a consultation: and of the writ of *Indicavit*.

18 An analysis or vnfolding of the two speciall statutes touching *Premunire*, with sundry questions and doubts about that matter, requiring more graue resolution.

THE

THE FIRST PART OF an Apologie of certeine proceedings in COVRTS ECCLESIASTICALL,

wherein is chiefly ſhewed what matters be incident to Eccleſiaſticall conuſance, and ſo allowed by Statutes, and Common law.

CHAP. I.

That a ſeuerall royall aſſent is not required to the executing of euery particular Canon.

IF no Canon or Conſtitution Eccleſiaſtiall might now be put in vre, but ſuch as her Maieſties expreſſe aſſent is firſt had vnto; then do all their other opinions againſt the *ordinarie iuriſdiction eccleſiaſticall* ſtand in no ſtead, and might be ſpared; becauſe this would ſerue to cut off all at once, which they ſhoot at. For none that exerciſe *ordinarie iuriſdiction* haue hitherto had it in particularity (which by the oppugners ſeemeth to be meant) otherwiſe then by permiſſion of law, vnto euery of their proceedings. Neither in trueth, for the infinitie of it, and troubleſomneſſe to procure ſuch aſſent from her Maieſtie, for euery particular matter & diœceſſe of this Realme (from time to time) were it poſſible to be vſed. Now if *Ordinaries* (from whom either mediately or immediately, *appellations* do lie vnto her Maieſtie in the *Chancerie*) by reaſon of the want of ſuch particular aſſent, vnto the execution of euery *canon*, ſhall (according to this conceit) haue nothing to doe; then cannot the *Queenes delegates* neither (to whom *appellations* from *Ordinaries* doe come) haue any thing wherein to beſtow their trauell: and therefore this point ſeemeth firſt of all meet to be cleared, and to be beſtowed in the firſt ranke.

The abſurdity of this opinion (whoſoeuer were the hatchers of it) will eaſily ſhew it ſelfe. For if matters *teſtamentary* & *matrimoniall* (which all they grant to be *eccleſiaſticall*) right of tithes, and

and ſundry other cauſes (which ſhall be alſo prooued ſo to be) ſhall not, ne can not, by reaſon of this want, be diſpatched (as now they are) by *eccleſiaſticall iuriſdiction*, and yet can not be dealt in by any other authoritie, according to any law now in force: then is there a maine imperfection in the policie of this *Common weale*, *viz.* For men to haue a right, and yet no likely or readie meane to come by it: and for groſſe offences to be committed (that are by law puniſhable) and yet no man ſufficiently authorized to execute ſuch lawes.

The iudgement of whole Parliaments kept in ſeuerall *Kings* and *Queenes* reignes (ſince that act, whereupon this fancie ſeemeth to be grounded) ſo many as haue had cauſe to ſpeake of the iuriſdiction eccleſiaſticall, doe alſo fully conuince it. The

[1] 25.H.8. ca.19. [1] ſtatute for *delegates* vpon appellations, doth argue, that *Ordinaries* might (without further leaue obteined, as in former times they did) execute their *iuriſdiction eccleſiaſticall*. For if there were to be no more *ordinarie* proceedings, till the king ſhould giue his aſſent to the execution of euery canon; for what vſe ſhould *appellations* from the decrees and iudgements of *Ordinaries*, be there prouided for? Likewiſe [2] two ſtatutes were not long after prouided in aſſiſtance of iuriſdiction ordinary, and for the better and ſpeedier recouerie of *tithes* in Courts eccleſiaſticall, according to the courſe of the eccleſiaſticall lawes in that behalfe.

[2] 27.H.8. ca.20. 32.H.8.cap.7.

[3] 34. & 35.H.8. cap.19. And the [3] like was alſo enacted for recouerie of penſions, procurations &c. withholden.

[4] 1.Ed.6. cap.2. In the time of *K. Edward the ſixt*, in [4] a ſtatute (ſince repealed by queene *Marie*) a great number of particular cauſes of *iuriſdiction eccleſiaſticall*, are there (by the way) rehearſed; that *Ordinaries* & other *eccleſiaſticall Iudges* might, and did then deale in.

In the time of queene *Marie* (before the ſupremacie was giuen vnto the Pope) the

[5] 1.Mar.cap.3. [5] act for not *diſturbing of diuine ſeruice or preaching*, reſerueth the iuriſdiction that *Ordinaries* then had, for puniſhment thereof, by *lawes eccleſiaſticall*, ouer and aboue the penalties (of new) thereby inflicted.

[6] 1.Eliz. cap.2. In the *Queenes Maieſties* [6] time that now is; by the act for vniformitie of Common prayer, *Ordinaries &c. may enquire &c. and puniſh the violations of that act, by cenſures &c. as heeretofore hath bene vſed in like caſes, by the Queenes eccleſiaſticall lawes.*

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The Statute *De excom. capiendo*, reckoneth [1] vp (particularly) diuers Crimes and offences *Ecclesiasticall*; punishable by that iurisdiction, which were hindered much from punishment that apperteined, for want of due execution of that writte *De excom. capiendo*, and therefore prouideth remedie therein. Which necessarily argueth the continuance and approbation of execution of *Iurisdiction Ecclesiasticall* by *Ordinaries*, without further obteyning of leaue. [1] 5. Eliz. ca. 23.

By the statute against periurie (made at the same time) [2] it is prouided, that it should not extend to *Courts Ecclesiasticall*: but that offenders in periurie, or subornation in a *Court Ecclesiastical, shall and may be punished by such vsual and ordinarie Lawes, as heretofore haue bene, and yet are vsed and frequented, in the saide Ecclesiasticall Courts:* which prooueth the vsuall practise of *Iurisdiction Ecclesiasticall* hitherto vsed (without any speciall assent) to be lawfull. [2] 5. Eliz. cap. 9.

The statute against *vsurie* prouideth, [3] that such *vsurie* as is aboue ten pound in the hundred by yeere, shall (notwithstanding the other penalties there newly inflicted) be also punished and corrected (as in times past) by the *Lawes Ecclesiasticall*. And by the [4] statute of *dilapidations*, the remedies that by the *Lawes Ecclesiasticall* were (afore) giuen against executors and administrators of incumbents; are there extended also to donees and alienees; to be (by the same authoritie) dealt with. In the which clauses of statutes, there is no repeale of any former particular statute or Lawe, nor any generall *non obstante* conteined. And therefore, if those *Parliaments* had bene of this iudgement; that no *Canon* might now be put in vre, without the *Royall assent* first obteined, there woulde haue bene added these, or some like words, viz. *They the said Ordinaries first obteining the royall assent for the putting in vre of such Canon, as they minde in that cause to proceed by:* that thereby (without all scruple of danger) their proceedings (so appointed to them) might haue bene warranted. But being altogether needelesse, it is no maruell though it were omitted. For can any man doubt (if it were needfull) but that there is a sufficient *Royall assent* had, when as it is giuen to the whole acte, before it can passe for a Lawe? [3] 13. Eliz. cap. 4. [4] 13. Eli. cap. 10.

Lastly, the same statute out of [5] which (as I coniecture) this [5] 25. H. 8. ca. 19.

opinion was ſtirred vp, doth eſtabliſh *all Canons which be not contrariant nor repugnant to the Lawes, Statutes, and cuſtomes of this Realme, nor to the dammage or hurt of the Kings prerogatiue Royall, that they ſhall now ſtill be vſed and executed as they were afore the making of that acte, till they ſhould be viewed &c. by the 32. perſons, &c.* which is not hitherto done. But ſuch were vſed afore, without any expreſſe or particular *Royal aſſent* (from time to time) obteined: and therefore may ſtill be vſed without any ſuch newe aſſent. For to exact it were (in very deed) to bring in a quite diſuſe of all ordinarie *Eccleſiaſticall* Iuriſdiction in ſtead of vſing it: which hitherto (from planting of *Chriſtianitie*) and in all ſucceeding times, hath neuertheleſſe bene practiſed.

This opinion, as an arrow ſhot vnaduiſedly at the *Biſhops*, glanceth off them, and woundeth very deadly the fauourers of the new *Diſcipline* (in whoſe behalfe it was framed.) for they are ſo farre from taking expreſſe leaue of the Prince, to put euery of their *Conſtitutions eccleſiaſticall* in vre, that they holde, *her Maeſtie* hath nothing to doe to make or eſtabliſh any *Church-lawes*. And the clauſe for vſe of ſuch former *Canons* and *Conſtitutions ſynodall* afore mentioned, *as they were vſed afore that time*, will not helpe the exerciſe of their *ſynodicall* cõſtitutions made long after in a Conuenticle, called together by their Moderators writ. But belike (when they ſet vp) the ſtatute *of ſubmiſſion of the Cleargie* ſhall be turned into a ſtatute of ſubmitting the Princes ſcepter, to the rule of their Presbyterie in all *Church-matters*.

[1] 25.H.8.ca.19. The chiefeſt colour and pretence [1] for this opinion, is taken (as I conieCture) out of the now reuiued ſtatute made in K. H. the eights time, *of ſubmiſſion of the Cleargie*. But the wordes thereof doe plainely diſcouer the weakenes of ſuch collection. for it is not enacted ſimply, that they ſhall *not put in vre, &c. any conſtitutions &c.* but *according to their aboue ſaid ſubmiſſion and petition*, which was, that *they would not enacte nor put in vre any* new *Canons, &c. in their Conuocation, without the Kings royall aſſent and authoritie in that behalfe*. Otherwiſe there were a flat contrarietie in the ſelfe ſame Acte, by reaſon of the laſt prouiſo thereof (next afore repeated) where *Canons* already made (ſo they haue the qualities thereby limitted) are appointed to be vſed. For it is there ſaid, *ſhall be now* ſtill *vſed and executed* as they were *before*

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the making of that Acte. And where in [1] the 27. yeere of the ſaid King, the ſame ſubmiſſion and former Acte is repeated, there in the very body of the ſtatute (touching not putting in vre of *Canons*, &c.) the ſame modification (as afore) is retained, viz. *According to the ſaid ſubmiſſion and petition of the Clergie*, which concerneth onely newe *Canons*. For of thoſe that were then *already made*, the very ſelfe ſame prouiſo (as afore is ſet downe) appointeth, that *they ſhall ſtill bee vſed and executed, as they were before the making of either of thoſe Acts.* Which was, without any ſuch expreſſe aſſent (as by this opinion is enforced) and is therefore neither requiſite, nor almoſt poſſible. [1] 27. H. 8. c. 15.

I haue alſo heard ſome alledge the [2] clauſe of the ſtatute, made for vniting of all *Eccleſiaſticall Iuriſdiction* to the *Crowne*; againſt the exerciſe of Iuriſdiction by any *Ordinaries*: which (to mine vnderſtanding) is a very ſimple collection. Belike they meane, that no *Iuriſdiction* is vnited to the *Crowne*, but there muſt be a *Commiſſion* vnder the great Seale (to warrant the execution of it) vnto him, that is to exerciſe it. Then muſt euery *Stewarde* of a Leete, euery *Conſtable*, and ſundrie other *Officers* be driuen to procure like warrant for the execution of their Temporall offices, for (I truſt) it will not be denied by theſe men, but that all *Temporall* authoritie and Iuriſdiction, is by Lawe alſo vnited to the *Crowne*. [2] 1. Eliz. ca. 1.

In deede this reaſon would ſerue againſt either the one or the other *Iuriſdiction*, if they were not deriued and claimed from the *Crowne*, but from ſome other authoritie immediatly; as the Popiſh Clergie did theirs from God, by the meanes and direction of the Pope. Yea euen another [3] *Parliament* ſheweth, howe farre this collection is from the minde of the makers of that Lawe. For that very clauſe *1. Eliz. ca. 1.* (together with her *Maieſties* letters Patents, directed foorth for confirming and conſecrating *Archbiſhops* and *Biſhops*) is brought, in the *Preamble* thereof, as a ſtrong proofe *without ſcruple and ambiguitie*, that the authorities and *Iuriſdictions* by them executed; be thereby giuen vnto them, from her *Maieſtie*. And therefore this opinion doth remaine deſtitute of any ground of Lawe. [3] 8. Eliz. ca. 1.

CHAP. II.

The particular distribution of all other causes to be prooued to be of Ecclesiasticall consusance, besides Testamentarie or Matrimonial, with a discourse of Bishops *certificats against persons excommunicate, being a speciall point of their voluntarie Iurisdiction, where there is no* partie *that prosecuteth.*

THe next opinion, viz. *That by the lawes of this Realme none Ordinary may cite any whomsoeuer, but in causes Testamentarie or Matrimoniall* (though it draw deepe) yet it hath not so large a reach, nor draweth so great a compasse as the former. For this leaueth some ordinarie Iurisdiction *Ecclesiasticall* in these two cases; where the other (vpon the matter) sweepeth away all. But if this be simply true, then the former must needes be false. For if (by Lawe) an *Ordinarie*, without more a doe, may cite men in these two cases, then may some *Canon, &c.* (by Lawe) be put in vre, without any further *Royall assent* to execute the same.

But if it shall be prooued true, that *(by the Law of the land) in some causes besides Testamentarie or Matrimoniall, an Ordinarie may cite:* Then this opinion, that *in no causes besides Testamentary or Matrimoniall, an Ordinarie may cite* (being the contradictorie thereof) must needes (according to rule of reason) be prooued false. For it will not be denied by any, but in what cause soeuer an *Ordinarie* may lawfully deale, in that (if neede be) he may vse citation. All matters done by *Bishops* (who onely be immediate *Ordinaries* vnder her *Maiestie*) either belong to their *order and degree*, as ordeining of Ministers or Deacons, cõfirmation of children, dedication of Churches or Churchyards, &c; or to their *Iurisdiction*. Their *Iurisdiction* is of two sorts: the first is *voluntarie*, that is, when those whom they deale with, doe not stand against it: (and such for the most part, are Institutions, probate of Wils, and committing of administrations, visitations, Certificats of *Bishops* into the *Q.* Courts, ordeining of *Reall* compositions in matters *ecclesiasticall, &c.*)

But something must here be said touching certificats of *Bishops*; because none so fit a place hereafter doth fal out, for this matter. A little *Treatise* set out in the time of *King Henry* the eight, and printed

printed by *Berthelet, cum priuilegio*, (prouing that by the lawes of this Realme the B. of *Rome* had not, ne ought euer to haue had any ſupremacie here) doeth [1] thus write of theſe certificates. If (ſaith he) *Excommunication, Baſtardy, Bigamie, Depoſition, or Deraignement of a religious perſon, or Diuorce, be certified by a Biſhop of this Realme, it is admitted in the Kings Courtes; but the Popes certificate is not admitted.* And as certificates of Biſhops be in theſe caſes admitted at the *common* lawe, ſo haue ſundry ſtatutes ſince, authoriſed their Certificates duely made into the Queenes Courtes, in certaine other caſes.

[1] Cap. 1.

Neuertheleſſe, I finde two caſes in the ſaid *Treatiſe*, where the *Certificate* of a mans *excommunication* from a *Biſhop*, ſhall not diſable the partie excommunicated from his action: as regularly excommunication doth when it is duely certified.

For firſt, [2] *if a Biſhop be a partie to a ſuite, and doe excommunicate his aduerſarie; ſuch excommunication (though it be certified) doeth not diſable his aduerſary in his action.*

[2] Ibidem ca 4.

Secondly, [3] *where an action of debt was brought by an executour, and an excommunication vnder a Biſhops ſeale was pleaded againſt ſuch executour; this was adiudged no good plea: becauſe the executour was not to recouer any thing to his owne vſe*: and for this there is alledged 14. and 21. Hen. 6. But if this were the onely ground and reaſon of ſuch iudgement, then where this reaſon is not found true in facte: as it may often happen, if the goodes and chattels be great, the debtes and legacies ſmall, and where the executour hath *clauſulam de reſidnis* by the will, viz. all the remnant of the goodes and chattels bequeathed to him: it woulde ſeeme to me (vnder correction) that in ſuch a different caſe, the lawe alſo ſhould be otherwiſe: becauſe much commeth to the executours owne vſe in particular.

[3] Ibidem.

This certificate of *excõmunication* by Biſhops of all the others is moſt in vſe: and would be of more vſe, to the great cõmoditie of her Maieſtie (eſpecially vpon the ſtatute *de excom. capiendo*) and to the terrour of ſundry malefactors: were it not for the chargeablenes of that courſe vnto *Ordinaries* (whom the tenth man that is certified, doeth not ſatisfie againe) and for the manifolde abuſes about the execution of that writte, committed by vnder officers: and were it not that, *iura & libertates, the lawes or*

rightes, and liberties of holy Church, graunted and confirmed by the *great Charter*, are not ſo *inuiolably* in theſe dayes mainteined; as was meant by [1] thoſe actes of Parliament, which doe exacte othes for obſeruation and defence of them.

[1] 25.Ed.3.ca.3.

It is a libertie peculiar to this Church of *England*, aboue all the Realmes in *Chriſtendome*, that I reade of: that if a man ſtande wilfully fourtie dayes together excommunicate, and be accordingly [2] certified by the *Biſhop* into the *Chauncery*, that then he is to be committed to priſon, by vertue of a writ directed to the Sherife. Notwithſtanding, that in one precedent (in the *Regiſter*) of this writ, it [3] is ſaid; *quòd huiuſmodi breue noſtrum, de gratia noſtra procedat.*

[2] Nota interlin. pag.Regiſt.65.b.

[3] Regiſt. in breu.original. pag.68.a.

For a note in the ſame booke vpon the ſame worde (vſed in another writte) doth teache vs; that ſuch clauſe is but vſed, *pro honore regio, etiamſi ad id de iure teneatur.* And it appeareth by ſundrie olde precedents of writtes there, that the graunting of this writ, is by lawe required: as where in a writ *de excommunicato capiendo* [4] it is ſaid: *quòd poteſtas regia ſacroſancta eccleſiæ in ſuis querelis deeſſe non debet.* And in ſundry other writtes of that kinde, it is [5] affirmed to bee, *ſecundum conſuetudinem Angliæ*, which is the *Common* lawe of this Realme. And therefore in other precedents of the ſame writte, the King ſaith [6] thus: *Nolumus quod libertas eccleſiaſtica, per nos vel miniſtros noſtros quoſcunque aliqualiter violetur.* And againe, [7] *Iura & libertates eccleſiaſticas illæſa volentes in omnibus obſeruari.*

[4] Reg. in br. orig.pag.65.

[5] Ibid.& pag.66. a.& b.68.a.& 69. b.& 65.b.

[6] Ibid.pag.69.a.

[7] Ibidem.

In theſe Certificates, the *Biſhops*, and others, hauing in ſome caſes authoritie to certifie (as the *Chauncellour* of *Oxford*, the *Cuſtos Spiritualitatis* of a vacant See, and the *Biſhops Officiall, and vicar generall, ipſo in remotis agente*) that they make none errour; muſt remember to obſerue theſe three things. Firſt, that it be [8] expreſſed therein, that the partie againſt whom they doe certifie, is excommunicated *maiori excommunicatione:* becauſe for the leſſer excommunication (as happely for companying with an excommunicate perſon) a man ſhal not be impriſoned. Secondly, that [9] it be certified, that he was by name and particularly ſo excommunicated; and not in groſſe, in companie of a multitude (as was often done in elder times) or indefinitely and in generalitie, as when the *BB.* excommunicated all, whoſoeuer

[8] Noua nat.breu. pag.64.f.

[9] Ibidem.

ſhould

ſhould violate any part of the *great charter*. For that excommunication (ſaith *Fitzherbert* in that place) muſt growe vpon a ſpeciall ſuite againſt a man either *ex officio*, or by a *partie*, whereupon a *Significauit* may be grounded.

Thirdly, [1] (if any inferiour officer vnder the *Biſhop* or his *Archdeacon*, did excommunicate the partie certified) yet muſt the *Biſhops* Certificate runne, that it was done *noſtra autoritate ordinaria*.

[1] Reg. in bre. orig. pag 69. b. & nota interlin. pag. 65. b.

But that the expreſſing in the certificate of a particular cauſe of the excommunication, is at the *Common* lawe (of neceſſitie) required; I cannot gather out of any place of the *Regiſter*, or of *Fitzherberts Natura Brevium*.

It is true, that when the proceeding is vpon any of the tenne crimes mentioned [2] in the ſtatute, made for that purpoſe; the particular originall cauſe muſt be expreſſed in the certificate.

[2] 5. Eliz. ca. 23.

Neuertheleſſe, when the proceeding is vpon any other crime of *eccleſiaſtical* coniſance, or in matters *teſtamentary*, *matrimonial*, or for tithes &c. whether moued *of office*, or at the *inſtance* of the partie; there the *Common* lawe (as it was afore) is reteined.

Nowe I finde precedents of theſe writtes in the *Regiſter*, wherein no particular originall cauſe, but onely generall be expreſſed; which, as in other certificates of *Biſhops* as touching baſtardy, &c. the Court beleeueth, without further trauerſe or examination. namely in ſundry precedents of this kinde of writtes, is onely conteyned, [3] that the partie was excõmunicated *propter ſuam manifeſtam contumaciam:* but what was the cauſe originall of his conuenting, out of which ſuch *contumacie* grewe, is not at all declared; and yet the certificates were allowed to be good in lawe.

[3] Reg. in br. orig. pag. 65. a. 66. a. 69. a.

Likewiſe in another precedent of the ſame writ, though ſome more particularitie be founde; yet is it left ſo generally, as the certaine and ſpeciall cauſe cannot thereby be knowen vnto the Court, to which it is directed. For it is [4] certified, that a partie was excommunicated, *propter ſuam manifeſtam contumaciam, in non parendo certis mandatis licitis ſibi factis:* but what thoſe *mandata* were, is not touched.

[4] Ibid. pag. 65. b.

And as theſe *Certificates* doe only in generality mention the parties

parties *contumacies*, and diſobediences: ſo is there alſo a precedent there, of crimes themſelues certified but in a generality, whereupon a writ of *excommunicato capiendo*, was neuertheleſſe awarded. For it is [1] teſtified that a Clerke excommunicated *propter manifeſtas offenſas ſuas*, was appointed to be attached, and thereupon impriſoned.

[1] Ibid. pag. 66. b.

Notwithſtanding this be a ſpeciall right and libertie of this Church of *England*; yet is not this writte *de excommunicato capiendo* alwayes to goe foorth, and vpon euery certificate whatſoeuer of a *Biſhop*, or of other thereunto authoriſed; albeit the certificate be contriued into neuer ſo due forme. For if he [2] that did excommunicate, be himſelfe for ſome ſuppoſed contempt to be attached at the ſuite of the partie certified: then ſhall the execution of the attaching of the partie excommunicated be reſpited, till the other plea of the *Ordinaries* attaching be determined: leaſt otherwiſe the *parties* ſuite againſt the *Ordinarie* ſhould be hindered by his impriſonment. Yet it is [3] to be vnderſtoode, that a *Biſhop* ſhall haue *Significauit* vpon his owne certificat, touching an excommunication for *contumacie*, incurred euen in his predeceſſours time.

[2] Reg. in breu. orig. pag. 67. b. & in breu. Iudic. pag 39. 71. b. & 72.

[3] Nou. nat. br. pag. 64. & 65. f.

But albeit the certificate be duely made, and the writte *de excommunicato capiendo* be thereupon awarded foorth: yet if there be looſe or corrupt execution thereof by the Sherife, or by his vnder officers; both the endeuour of the *Biſhop*, and care of the *Queene* to haue contemptuous perſons iuſticed, are wholy fruſtrated. Though this careleſneſſe in times paſt were not ſo common as nowe it is; yet it [4] ſeemeth by the *Aliâs* and *Pluries* in the Regiſter, that Sherifes, and their vnder officers were then alſo ſlacke ynough, to perfourme this part of their duetie: howbeit it is teſtified by the Kings writ in this behalfe, [5] that the vndue execution of it, redoundeth *in contemptum manifeſtum regis, epiſcopi damnum non modicum & grauamen, ac turis Eccleſiæ ſuæ laſionem manifeſtam.* In which regard, ſuch a negligent Sherife is (by lawe) vpon a writ to be called into the Court, whence the writ iſſued; there to anſwere ſuch his contempt.

[4] Reg. in br. orig. pag. 65. a.

[5] Ibid. pag. 65. b.

The effect of the writ *de excommunicato capiendo*, (when he hath his due courſe and execution) is double. Firſt, vpon the very certificate of the *Biſhop*, the partie excommunicated, is to be debarred

debarred action in all the *Queenes* Courts. Yet if vpon an [1] *appellation* by him made from the ſentence of *excommunication*, he be deliuered out of priſon; or haue a *Superſedeas* thereupon; then is he not to be barred from action in reſpect of ſuch certificate, or of the ſentence of *excommunication*. Secondly, the [2] partie is to be impriſoned by his body. *Per corpus ſuum ſecundum conſuetudinem Anglia, inſticies, donec &c.* This iuſticing by body according to the cuſtome of *England*, is committing to priſon; and that [3] without baile or mainpriſe. Nither [4] doth the writ *de homine replegiando*, lie in this caſe. Now a man being thus in priſon, I finde in law but two meanes of his deliuery. The firſt is, by ſubmitting himſelfe to the *biſhop*. This ſubmiſſion may be in two ſorts: either by preſent *ſatisfaction*, at or immediately vpon his deliuery; or by *caution* put in, that he will hereafter performe it. *Quia vicecomes* (ſaith a [5] writ in the *Regiſter*) *nulla inde facta ſatisfactione, aut praſtita cautione prout moris eſt, de parendo mandatis eccleſia in forma iuris, quoſdam deliberauit; idcirco &c.* where we alſo ſee, to what end the *caution* (by the party excommunicate) muſt be put in, agreeably to ſundry [6] other precedents of this writ, *viz. de parendo mandatis eccleſiæ, in forma iuris*. Which is to performe that which the *biſhop* ſhall reaſonably and according to law, enioyne vnto him. For it was thought moſt inconuenient, that he who had reſiſted the courſe of law, & contumaciouſly perſiſted in *excommunication*, vntill his impriſonment; ſhould now be truſted without good ſecurity firſt giuen, afore his deliuery. This clauſe of thoſe writs in the *Regiſter*, *Fitzherbert* [7] doth tranſlate thus into French, *viz. de eſtoier & obeier les ordinances & rules de ſeint eſgliſe*.

1 Nou. nat. br. pag. 65. d.

2 Reg. in br orig. pag. 65. a. & b.

3 Weſtm. 1 3. Ed. 1. cap. 15. 5. Eliz. cap. 23.

4 Nou. nat. br. pag. 66. e.

5 Regi. in br orig. pag. 67. a.

6 Ibid. pag. 65. b bis 66. b, & 67. a

7 Nou. nat. br. pag. 63. c.

Vnder the clauſe *in forma iuris*, is that other part of ſubmiſſion conteined: which is preſcribed by the law eccleſiaſticall in this caſe of ſubmiſſion and of giuing *caution*; *viz. de parendo iuri*. This appeareth by that writ in the [8] *Regiſter*, where a clerke impriſoned vpon the *ſignificauit* offered *caution* to his ordinary (the *biſhop of Elie*) *de parendo iuri*; but yet could not thereupon alone be deliuered, for that he expreſly refuſed, to ſatiſfie *tam de iniuria eccleſiæ illata, quàm de contemptu*, as the writ required. This forme *de contemptu & iniuria*, is not only here, but in [9] other precedents alſo of this writ obſerued, as they be recorded in the *Regiſter*.

8 Reg. in br. orig. pag. 66. b. & 67. a

9 Reg. in br. orig. pag. 65. a. b. 68. a.

And in another writ by words more generall, yet tending to the
[1] Ibidem 65.b. same purpose, *viz.*[1] *ad satisfaciendum Deo & sanctæ ecclesiæ sufficientem exposuit cautionem, To satisfie God, viz.* for his continued contempt of the keies & power of his church: and *to satisfie the church*, aswell for the euill example and scandall giuen, as for the needlesse charges that he had put the officers vnto, to bring him to conformity. For it seemeth when a *caution* was put in onely thus: *de parendo iuri & mandatis ecclesiæ, in forma iuris:* that by reason of the generall conceiuing thereof, sundry tooke occasion to wrangle & quarrell with that, which was after enioyned vnto them, as if it were not conteined within the words or meaning of their *caution*: and therfore that clause that such should *satisfie for their contempt, & for the iniury to the church*, was often vsed in the *kings writs* of that nature, to auoid all cauill, and for more full explanation. In such *caution*, two things besides are required: the one, that it be *idonea & sufficiens*, as appeareth by all the writs in this behalfe, that be set downe in the *Register*: the other, that it
[2] Ibid.pag.66. b. & 67.a. Nou.nat.br. pag.63.c. be offered by the party, who is to submit himselfe. For it is[2] said in one of those writs thus, *viz. Idem W. cautionem saltem pignoratitiam (tuxta intentionem mandati nostri prædicti) de satisfaciendo de huiusmodi contemptu & iniuria, antequam à prisona prædicta deliberetur, offerre debet & tenetur.* For a *caution* is not imposed by the *Ordinarie*, but is accepted by him vpon the parties submission and offer therof; when he seeketh to be absolued from the censure, and deliuered out of prison.

But what may be reckoned to be *idonea & sufficiens cautio*, I finde not determined or colligible out of the bookes of Common law. One kinde thereof which is *pignoratitia*, a *caution* reall or by gage, is mentioned in the next allegation afore. And in that it is there said, the party should put in *cautionem saltem pignoratitiam*, we are thereby giuen to vnderstand, that the courts of Common law doe take knowledge of some other kindes of *cautions* besides this, and accounteth of this, as being not of the most grieuous sort of *cautions* vnto the partie.

The word *Cautio* is a terme taken out of the *Ciuill* law; for
[3] Nou.nat.br. pag.63.c. which (at the Common law) they[3] vse securitie or obligation &c. therefore what be the seuerall kindes of *cautions*, must be taken out of that learning.

Cautions

Cautions in Ciuill law be of three ſorts: one is *Fideiuſſoria*, as when a man bindeth himſelfe with ſureties to performe ſomewhat. another is *Pignoratitia* or *realis Cautio*, as when a man gageth his plate, or morgageth his land for performance. the laſt is *Iuratoria cautio*, as when the party which is to performe any thing, taketh a corporall oath to do it. By the *Ciuill* law, a Iudge is not bound to accept of this laſt, vnleſſe the partie will alſo ſweare, that he is not able to put in either of the other. And therefore where *Ordinaries* doe promiſcuouſly at abſolutions accept this *Iuratorie caution* offered *de parendo iuri, & ſtando mandatis eccleſiæ, in forma iuris*; they doe more then they ſimply need to doe; and rather gratifie then doe any grieuance to the partie, as ſome haue thought.

For ſeeing this hath bin the moſt vſuall, nay (for a long time) almoſt the only *caution* giuen at abſolutions; that they may lawfully ſtill accept it, is made manifeſt by ſtatute, *viz. ſauing and reſerning to all archbiſhops and biſhops, and all others hauing authoritie to certifie any perſon excommunicated, like authoritie to accept and receiue the ſubmiſſion and ſatisfaction of the ſaid perſon ſo excommunicated, in maner and forme heretofore vſed, and him to abſolue and releaſe.* &c. *5. Eliz. cap. 23.* yet is not any of them ſo ſimple, but he will thinke either of the other two (if they be offered) to be better ſecurity then the parties bare oath; a matter ſo little regarded of moſt men in theſe latter times of this bad world. For *ſatius eſt incumbere rei quàm perſonæ*: Reall ſecuritie is more ſafe then perſonall.

Now when ſuch *caution* is offered as the *Ordinarie* doth accept of, for the parties performance of that which ſhall be enioyned vnto him: ſhall he needs be forced to ſend for a writ of deliuerance vnto the *Chancery*? No verely. For the *biſhop* himſelfe, if he will, may enioyne the *ſhiriffe* to deliuer him. *Accedas* (ſaith [1] the writ vnto the *ſhiriffe*) *in propria perſona ad epiſcopum, & ex parte noſtra moneas & efficaciter indicas, vt accepta cautione prædicta, ipſum mandet deliberari à priſona.* And againe, a writ to a *biſhop* runneth thus: *Mandamus quòd accepta cautione prædicta, ipſum deliberari mandetis, alioquin quòd noſtri eſt in hac parte exequemur.* And therefore *Fitzherbert* [2] ſayeth plainelie, that the *biſhop*, or hee at whoſe certificate the partie was taken,

[1] Reg. in br. orig. pag. 66. a. & nou. nat. br. pag. 63. c, d.

[2] Nou. nat. br. pag. 63. g.

taken, may command the *shiriffe* to deliuer him out of prison.

But what if the *Ordinarie* shall refuse to admit of the *caution* offered, and thereupon to release him, albeit the *caution* be *good and sufficient*: shall the partie remaine still in prison? Nay, the writte *de cautione admittenda*, is prouided for remedie in such a case. This not deliuerance, after sufficient *caution offered*, may happen either vpon negligence & delay in the *bishops* vnder-officers; or vpon his owne wilfulnesse. Vpon such vnder-officers delay; as when the *bishop* willeth them to absolue the party excommunicated: in which case [1] the *shiriffe* is not to make deliuerance, till it appeare vnto him, that the party is (indeed) absolued. Neither is [2] such *officiall* or *archdeacon* bound to certifie the *shiriffe*, that they haue receiued letters from the *bishop* to absolue him: but the *shiriffe* ought to go or send to them, to know the truth, and accordingly to make deliuerance. If it happen vpon the *bishops* owne wilfulnesse; in such case I finde two degrees obserued in proceeding: for first [3] there goeth a writte to the *bishop* himselfe, that he admit of the caution, and also that he command the partie imprisoned to be deliuered; or else the king will doe that which apperteineth to him, in like case to be done.

But if this will not serue the turne, then secondly may the party haue a [4] writ directed to the *shiriffe*: that in his owne person he repaire to the *bishop*, and on the *Queenes* behalfe monish him, and effectually require him; that taking first such *caution*, he command the prisoners deliuerance: and that if he shall refuse in the *shiriffes* presence to doe it, then the *shiriffe* himselfe (taking [5] such sufficient *caution* of him) doe deliuer him. And if the *shiriffe* also shall appeare to be negligent or wilfull; the [6] partie may haue the like writte to the *Coroners*. But they must likewise first (before they deliuer him) take *sufficient caution* of him, *viz. de parendo mandatis ecclesiæ in forma iuris: & de satisfaciendo tam de contemptu, quàm de iniuria ecclesiæ illata.*

If the *shiriffe* be too forward, so that the *bishop* feareth that he will deliuer the [7] prisoner by coulour of some writte, without taking such *caution*, as may be iudged *sufficient*; then may the *bishop* purchase a writ to the *shiriffe*, that in no case the prisoner be deliuered; except in his presence, he offer to the *bishop cautionem*

saltem

[1] Reg. in br. orig. pag. 65. b. Nou. nat. breu. pag. 63. f.
[2] Ibidem.
[3] Reg. pag. 66. a. Nou. nat. breu. pag. 63. d.
[4] Reg. in br. orig. pag. 66. a. Nou. nat. breu. pag. 63. d.
[5] Reg. pag. 67. a.
[6] Reg. 66. a.
[7] Nou. nat. br. pag. 63. & 64. h. Reg. pag. 66. b. & 67.

ſaltem pignoratitiam; at the leaſt a gage or reall caution, *de ſatiſſaciendo, &c.*

But if the *Shiriffe* ſhall in deede deliuer him out of priſon without ſuch *ſufficient caution* (which in the [1] *Regiſter* is thus expreſſed; *nulla inde facta ſatiſfactione, aut præſtita cautione prout moris eſt, de parendo mandatis Eccleſiæ, in forma iuris*) then muſt a Writ goe foorth out of the *Chancerie*, for the new attaching of the priſoner; conteining alſo a *Venire facias* for the *Shiriffe*; that hee doe appeare and anſwere his contempt. For ſuch his dealing, is there ſayd to be, *In læſionem libertatis eccleſiæ, & contemptum manifeſtum regis*. Thus much touching the firſt meanes of deliuerance of a perſon excommunicated out of priſon. [1] Reg. p. 67. a. Nou. nat. br. pag. 64. b.

The other meane for deliuerance of ſuch excommunicate perſon out of priſon, is when hee hath appealed to a ſuperiour eccleſiaſticall Iudge, from the ſentence of *excommunication* giuen againſt him; as vniuſt, or as voyde and erroneous. For if hee reſt in the ſentence giuen, then muſt hee needs ſubmit himſelfe, and offer caution, as afore is ſayd. But if hee holde himſelfe to bee vniuſtlie delt with, and therefore will not ſubmit: then ought he not to be enlarged out of priſon, but vpon *Appellation* made to the ſuperiour Eccleſiaſticall Iudge, who is the onely competent and able Iudge (in that behalfe) to determine; whether hee haue bene duelie proceeded with, and rightfully excommunicated, *Iuxta canonicas ſanctiones*, or not: as [2] appeareth by ſundrie of theſe Writtes in the *Regiſter*, and otherwiſe. [2] Reg. pag. 69. b. & 70. a & b. Nou. nat. br. pag. 64. c.

The reaſons why ſuch one is not to bee detained in priſon that hath appealed from the ſentence of excommunication, are firſt, becauſe vpon the *Appellation*, the Iudge from whom it was made, doeth thereby ceaſe to bee his Iudge in that cauſe. Secondlie, for [3] that the nature of an appellation is, to put the *Appellant* into the ſame ſtate that he was in before the ſentence giuen, for the doubtfulneſſe that is in the meane time of the validitie or inualiditie of it. Thirdlie, by reaſon that where the preſence of the *Iudge* to whom the *Appellation* is made, may be had: there the partie *Appellant* is (for the time) vſuallie abſolued and releaſed from the *excommunication*. Laſtlie, leaſt by his impriſonment hee bee hindered from the effectuall proſecution of his [3] Ibid. pag. 68. a.

Appeale, which may happen prooue to haue bene iuſt.

If allegation bee made to the court in his behalfe, againſt whom the Writte *de excommunicato capiendo*, is awarded and gone foorth, that he hath appealed: and yet it doe not authenticallie ſo appeare by *publike inſtrument* there ſhewed; yea (for the moſt part) euen where ſuch *publike inſtrument* hath bene ſhewed: a [1] Writte of *Scire facias* firſt goeth foorth to the *Shiriffe*, that he doe [2] warne the *Biſhop*, and him who did proſecute the partie impriſoned; to come into the court, and there to ſhew cauſe why the *Shiriffe* ſhould not ſurceaſe from attaching him, or deliuer him if he be afore in priſon, whiles the matter of the *Appellation* dependeth. In the ſame Writ alſo (for the moſt part) is conteined, that the partie (if hee bee taken) either ſhall bee brought [3] vp into the *Chancerie*, vnder ſure and ſafe gard, or elſe ſhall find ſufficient mainpernors that ſhall vndertake for him bodie for bodie, for his perſonall apparance in court at the day prefixed; alſo that he ſhall proſecute his Appeale, and that hee ſhall receiue and endure what the court ſhall thinke good to order him vnto; yea [4] that his mainpernours ſhall ſafely euen redeliuer him againe to the priſon where he was; if it ſhal happen that the court ſhall ſo order it.

[1] Reg. 69. b. 70. a. & b. Nou. nat. br. pag. 65. b. c.
[2] Reg. pag. 70. b.
[3] Reg. pag. 69. & 70. Nou. nat. br. pag. 65. c.
[4] Reg. pag. 70. b.

Now if the *Biſhop*, when the proceeding was *of Office*, or the partie at whoſe *inſtance* it was; doe [5] not come vpon the *Scire facias* ſerued at the day prefixed, or at furtheſt *quarto die poſt*, (vnto which day the cuſtome of the *Chancerie* is to continue the Proceſſe) thē is the partie to be deliuered out of priſon; ſo that it doe firſt appeare by *publike inſtrument* that he hath in deed *appealed*.

[5] Reg. pag. 70. a.

But if the *Biſhop* [6] and hee that proſecuted, either by themſelues or by their Attorney, doe come at the day prefixed; and hee that was impriſoned or his mainepernours doe not come: then a Writ for the *reattachment* of the excommunicated perſon goeth foorth to impriſon him; vntill hee ſatiſfie *tam de contemptu, quàm de iniuria eccleſiæ illata*. And likewiſe an *Attachment* for his mainpernours, to be brought into the court to ſatiſfie the *King*, the *Biſhop*, and him that proſecuted; and to receiue what the court ſhall further conſider. And this courſe of *Scire facias* before the partie be deliuered, doth ſeeme chieflie to be obſerued; when there may be doubt made, that ſome cauſe

[6] Reg. pag. 70. b. Nat. br. pag. 65. e.

may

may be alleaged (by thoſe who haue intereſt) why hee ſhould not be deliuered.

If no ſuch doubt may be made, and when by very [1] *authenticall publike inſtruments* (ſhewed foorth in court) his *appellation* euidently appeareth; there ſometimes without any *Scire facias* firſt awarded, a *Superſedeas* is directed foorth vnto the *Shiriffe*. [2] Neuertheleſſe (in this caſe) the partie muſt within the yeere of his *Appeale*, by witneſſes or othe; prooue his diligence in proſecuting his *Appeale* with effect.

[1] Nou.nat.br. pag.64.e.

[2] Ibid.& Nota interlin.in Reg. pag.68.b.

For there are precedents of ſuch Writs in the *Regiſter*, where no *Scire facias* before the *Superſedeas* went foorth, for any thing that there appeareth, viz. *Quia* C. *appellauit* A. [3] *ſententia excommunicationis tanquam ab iniqua, & proſequitur appellationem cum effectu, prout per inſtrumenta publica apparet: nos nolentes quòd prefato* C. *per prædictum breue noſtrum via præcludatur, quominus dicta appellationis ſua negotium proſequi poſſit in forma iuris, &c. maximè cum appellantium ſtatus debet eſſe integer, ideo pendente appellatione ſuperſedeas, &c.* And thus farre of the ſecond means of deliuering an excommunicated perſon out of priſon. But mo or other means then theſe two, (for my part) I haue not hitherto found mentioned in any Statute, or any report of the Common lawe; though I haue carefully ſought for them.

[3] Reg.pag.68.a. & 69.a.& b. Nou.nat.br. pag.64.e.

Now I will reſume againe (after this long, but I truſt not vneceſſarie digreſſion) the ſecond member of eccleſiaſticall Iuriſdiction; called *contentioſa Iuriſdictio*. That is, when ſuch matters be handled; againſt which ſome partie ſtandeth, or is delt with thereby againſt his will. If it be *contentioſæ iuriſdictionis*, whether it be for a *right* there *demandable* and *determinable*, or elſe for a *crime there puniſhable*, (which are the heads of all *litigious Iuriſdiction eccleſiaſticall*) it cannot be intended, that *pars rea, is contra quem res agitur*, the partie to be delt againſt, will *gratis* without proceſſe appeare, & frō time to time attend: except it happē ſomtimes by colluſion w̄ the plaintife. And in this reſpect (amōgſt others) it is ſaid, that *indiciū redditur in inuitū*: & *Reus* is called *pars fugiens*, the partie preſumed to come thither againſt his will, and willing inough to be gone if he might. Therfore if any cauſe, beſides thoſe two, ſhall be proued ſuch, as the Ordinarie may lawfully deale in; it wil folow, that in ſuch a matter alſo he may vſe a

citation

citation to call him. *Dato enim principali, neceſſaria adiacentia veniunt in conſequentiam.*

But that an Ordinarie may deale in ſundrie other cauſes beſides theſe two, it ſhall appeare both by Statutes (which are the iudgements of the whole Realme) and by the iudgements and vncontrolled opinions reported in the bookes of the Common lawe.

[1] Ariſtot. in lib. poſter. Analyt.

In diſcourſe whereof will appeare not onely [1] τὸ ὅτι, that the matter is ſo, but alſo τὸ διότι, καὶ ἰσοῖον τι, the reaſon why, and in what maner and ſort it is *determinable* or *puniſhable* there: being three principall queſtions to be opened, for the perfect knowledge of any thing that is to be handled: and ſeruing in theſe controuerſies, to ſome further vſe and profite, which may lighten you in the length of the diſputation.

Purſuing therefore the two former heads of that part of Eccleſiaſticall Iuriſdiction: firſt the matters by *litigious Iuriſdiction demandable and determinable*, are either ſuch as are yeelded to be meere Eccleſiaſticall (by the authors of this opinion) viz. *Teſtamentarie* and *Matrimoniall:* to the firſt whereof (for affinitie ſake) I adde *laſt Wils*, (ſuch as may not be termed *Teſtaments,*) *Codicils, Legacies, Adminiſtrations,* & *Sequeſtrations* of the deads goods, (commonly called letters *ad colligendum:*) and to the later, I ioyne *diuorces, iactitation of Matrimonie, queſtions of legitimation or baſtardie, for reſtitution of a mans wife taken away, that a man ſhall receiue his wife againe,* and *ſuites for goods or chattels promiſed with a woman in mariage:* or elſe they are ſuch others (claimed to bee Eccleſiaſticall) as remaine ſtill (by this opinion) in controuerſie. All which (I thinke) may bee comprehended vnder the generall terme of *reliqua iura Eccleſiaſtica.*

'And theſe are either ſome duetie ariſing at firſt vpon exerciſe of *voluntarie Iuriſdiction*, and yet by deniall made *litigious:* & ſuch be *reall compoſitions* ſought by ſome partie to be diſanulled, *procurations, penſions, Synodals, Pentecoſtals, indemnities, fees for probates, &c.* or growing due only vpō exerciſe of *litigious Iuriſdiction:* & theſe are either due to the *Iudge* himſelfe (as *fees of citations, fees of ſentences, &c.*) or are due to others attendants in the Court, (as fees of *Aduocats, Proctors, Regiſters, Apparitors, &c.*)

or

or else they are such as are due to *Ministers* in the Church, that haue no title, as *wages for a Curate*, or a *Clerke*, or vnto a *Minister, that hath title.* And this right of a *Minister* that hath title, toucheth either something incident to him, as to name the Parish *Clerke:* or concerneth the whole *title and interest* in and to his *benefice*, or else toucheth but his maintenance and liuing. His *interest and title* tendeth either *to attaine* it when he pretendeth iust title to it, or *to reteine it* being in his possession, or else *to recouer it* being bereaued or spoiled of it.

The dueties which concerne *Ministers* maintenance, are *tithes of all kindes, Oblations, Obuentions, Pensions, Mortuaries, Churchyard or place of buriall, &c.* Or lastly, it is something, that is due to a whole Parish, as *to haue a Chapleine found*, or *diuine seruice*, or *Sacraments administred amongst them*, or *something due to their Church to be deliuered*, or *for a Parishioner to be contributorie with* the rest to reparations of the Church, to seates, to bels, to the buying of bookes, of *Vtensiles*, or of other ornaments, and requisites in the Church.

Concerning *crimes* & offences claimed to be *punishable* by *Iurisdiction Ecclesiasticall:* they may al (I thinke) be reduced to some of the three heads, touched by *S. Paul:* viz. as being contrary either to *Pietie vnto God*, to *Iustice towards our neighbour*, or *Sobrietie towards our selues.* That which is against God; the *Latinists* cal by the name of *Impietas*; that which is against a mãs neighbour, they terme *Facinus*; and that which a man designeth against himselfe, *Flagitium.* albeit the two last be often confounded, without any curious obseruation of such proprietie of wordes.

Against *Pietie to God-wardes*, are these: *blasphemie, swearing, idolatrie, heresie, errour in faith, schisme, apostacie from Christiantie, not frequenting publike prayer, neglect of the Sacraments, periurie in an Ecclesiasticall Court or matter, disturbance of diuine seruice, violating and prophaning the Sabboth*, and such like. Contrary to *Iustice* are these: *Simonie, vsurie, diffamation, subornation of periurie* in a Court *Ecclesiasticall: violence to a Minister, sacrilege, dilapidations, not building of a Church enioyned by a testatour; not fencing the Church-yard; not repairing a Church or Chauncell, or not keeping of it in comely sort; or when a Church-warden refuseth to yeelde an account of the Church stocke, & goodes; & violating of a sequestration*

made for tithes not paide; hindering to gather or carry tithes; money promiſed for redeeming corporall penance, and detained; contempt to the eccleſiaſticall iuriſdiction, fighting or brawling in Church or Churchyard, and ſuch like. And againſt *Sobrietie* are theſe: all *Incontinencie* (not made death by the lawe of the Realme) whether committed with one which is of his kindred in blood, forbidden either in generalitie, or by ſome of the degrees *Leuitical*, or with one of his alliance ſo forbidden, both which are called *inceſt:* or committed by ſuch whereof the one is married, which is *adulterie:* or where the one of them hath bin maried, termed by ſome *ſtuprum:* or where both be ſingle, termed *ſimplex fornicatio:* or whether it be *marying of two wiues*, or *being maried vnto two husbandes at once*, which is called *Polygamie: Sollicitation of a womans chaſtitie, drunkenneſſe, filthie ſpeeche*, and ſuch others.

There be alſo certaine puniſhments and cenſures (beſides theſe) which I thinke will be yeelded to be matters of *eccleſiaſticall iuriſdiction*, as *enioyning of penance; ſuſpenſion* from entrance into the Church, or from the Lordes ſupper, or from execution of a miniſters office, or from his benefice; *ſequeſtration* of a benefice; *interdiction* of ſome place, from hauing ſeruice or ſacraments there adminiſtred; *interdiction* of ſome certaine acte, (as not to marry, whiles a ſuite *matrimoniall* dependeth) and *excommunication*, the leſſe and the greater.

I doe alſo finde in writers of the *Ciuil* and *Eccleſiaſticall* lawes, certeine offences affirmed to be of *eccleſiaſticall conuſance:* which may ſeeme (euen in this Realme) to be ſuch, albeit I doe not expreſly reade them to be ſo accounted, in ſtatutes or reportes of the *Common* lawes. As for *violation* or *perturbation* of liberties *eccleſiaſticall*: for admitting of excommunicated perſons, vnto action or teſtimonie in a *temporall* Court: *forging* of letters and matters *eccleſiaſticall*, as teſtimonials for ordeining &c. or vſing and *putting* them in practice wittingly: *burying* excommunicate perſons, or notorious heretikes in the vſuall places of good *Chriſtians*: *abbettours* and voluntary *company keepers* with perſons excommunicate: and *diggers* vp of corpſes buried.

Quære of theſe two firſt named: & ſee for the firſt Lyndwood c. externę. de pœnis. verbo regis Angliæ.

CHAP.

CHAP. III.

That matters in the former Chapter adioyned to teſtamentarie and matrimoniall cauſes (though properly they be not of teſtament or matrimonie) are of eccleſiaſticall conuſance, and howe farre.



Touching ſuch as I haue adioyned for neeerenesſe of qualitie, vnto matters *teſtamentarie:* Firſt a mans *laſt will*, (whereby *legacies* be giuen, but none is therein made *executour*) cannot be called a *teſtament*. The like is to be ſaid of a *codicill:* and a *legacie* though it be giuen by *teſtament*, yet may it alſo be giuen by ſuch a *laſt will*, and can (in neither caſe) be properly called a matter *teſtamentary*, becauſe it is but *Delibatio hæreditatis*, or *ſucceſſio particularis*. And by ſuite for a *legacie*, neither the *teſtament* commeth directly and principally to be proued, nor yet to be impugned. But much leſſe may *adminiſtrations* and *letters ad colligendum*, be properly accounted matters *teſtamentarie*, becauſe they are committed, when a man dieth *inteſtate*, or *per viam inteſtati*. Beſides that, the courſe of graunting adminiſtrations was not at the *common* law, but came in by ſtatute, long after this writte of *Prohibition* (whence this controuerſie ſpringeth) is pretended to haue beene framed. 31.Ed.3.cap.11.

As for *diuorce* (which by like reaſon I ioyned with matters of *matrimonie*) becauſe it tendeth to the ouerthrowe and diſſolution of *marriage*; it cannot be termed (properly) a matter of matrimonie: (though no man can be *diuorced* but he which hath beene married) no more then blindneſſe may be called ſeeing, for that nothing can truely and properly be ſaid to be blind, but ſuch as either once did ſee, or by nature of the thing, ſhould haue eyes: *Priuatio enim præſupponit habitum*. This appeareth alſo by a ſtatute; where *diuorce* is contrediuided and reckoned as a diuers ſuite from a cauſe of *matrimonie*. 24.H.8.ca.12.

Likewiſe *iactitation of marriage*, becauſe it tendeth (by the intention of him that bringeth the ſuite) to be cleered of a *matrimonie* or *contract matrimoniall*, that is pretended by the other partie; it can no more properly then the former, be called a matter of *matrimonie*. As for *goods or chattels that are promiſed with a woma̅*

in marriage, who seeth not, that it is a meere circumstance, nothing touching the validitie or inualiditie of a *matrimonie?* yet neuertheleſſe (I take it) no man is ſo wedded to his opinion, that he will deny the coniſance of theſe matters to belong to the *Eccleſiaſtiall* iuriſdiction, aſwell as cauſes properly termed teſtamentary or matrimoniall.

But I purpoſe to make the matter a litle more plaine, and withall to ſhewe, aſwell when and howe ſome matters *teſtamentary* themſelues, as the reſt annexed to *teſtamentary* or *matrimonial* cauſes (which I finde touched in the lawes of the realme) doe belong to the coniſance of an *eccleſiaſticall* Court, & when and howe vnto a *temporall* Court; beginning firſt with teſtaments. [1] *Theſe are to be proued before Ordinaries, ſauing in certaine places, where the lord in his temporall Court (by cuſtome) prooues the teſtaments of his tenants.*

[1] M.2.H.3. Fitz. teſta.4.

The *Canon* lawe doeth not permit an *Eccleſiaſticall* perſon to declare his will, and to diſpoſe of ſuch goodes as he hath gotten by reaſon of his *eccleſiaſticall* promotions as he liſte: but they muſt be left to that Church, by which he gotte them. But [2] *the lawe of this Realme is, that Clerkes may make their willes as liberally and freely, as any Lay man may: and that though they haue them, for their ſpirituall miniſtration.* And therefore by reaſon of this *contradiction* and *repugnancie* to the *Common* lawe, ſuch *Canons* are here of no force, nor in practice.

[2] Treatiſe of Conſt. prou. & legatine, printed by Thomas Godfrey tempore H. 8.cap.13.

Touching executours, it is ſometimes to be determined by the *Common* lawe, in what caſes, and who may be made an executour: for *a* [3] *woman* (by the *Common* lawe) *may make her husband executour of ſuch things whereof ſhe was executour to another before, or of a duetie due vnto her before couerture, or of rent being behinde, vpon a leaſe made vnto her for terme of life, or of a leaſe, or of any thing whereof the poſſeſſion muſt be attained by action: but ſhe cannot make him executour of that which ſhe hath in poſſeſſion. for by the very entermariage, the properties is in her husband: albeit, by the Spirituall law, aſwell in the one caſe as in the other, ſhe may make her husband executour: which (ſaith Tremayle* and *Frowicke) whether it be their law or no, is not to be diſputed by the Common law, becauſe we are ignorant, and cannot iudge what is their lawe.*

[3] T.12.H.7. fol.12.

And *if a man* [4] *be condemned in coſts in a court eccleſiaſtical, & after die,*

[4] T.12.H.7.

die, making an executour (by the opinion of *King ſmell*) *it is as good reaſon to ſue the executour in a ſpirituall cauſe, according to the Spirituall Lawe, as to ſue him for a temporall matter in the Temporall Lawe. Elſe* (ſaith he) *when an amends is adiudged in a Spirituall court, and the partie dieth, the other ſhoulde be without remedy, which were no reaſon:* and none did gainſay it. *But a*[1] *man may not ſue an executour in a Spirituall Court, for the teſtators debt: albeit if the teſtator enioyne the executor to pay the debt to him, hee may then ſue for it in Court Spirituall, becauſe of the iniunction and promiſe.* And this ſheweth how an Executor may be ſued or not ſued in an Eccleſiaſticall Court.

[1] H.6.H.3. referente Fitzh. tit.prohib.17.

Now an Executor may ſue another in a Spirituall Court touching his teſtatours goods, in this caſe, *viz. If a*[2] *man deuiſe or bequeath corne growing, or goods, vnto one, and a ſtranger will not ſuffer the executor to performe the teſtament for this legacie, he ſhall ſue the ſtranger for it, in a Spirituall Court.* But *if a man take from the executors, goods bequeathed: for this, the executor muſt vſe his action of treſpaſſe, and not ſue in the Spirituall Court:* for[3] *executours can not ſue for the goods of their teſtatour in a Court Eccleſiaſticall, but at the Common Lawe. If*[4] *a teſtament beare date at Caen in Normandie, and be prooued in England, the executour may vpon ſuch teſtament haue action.*

[2] T.4.H.3 referente Fitzh. tit, prohib.nu.

[3] 2.R.3.17.

[4] T.18.Ed.2. teſta.6.

Of *legacies* or *deuiſes* it will be ſufficient to touch a few points. In the books of the *Common* Law it is ſet downe, that *they*[5] *ſhalbe recouered in a Spirituall Court, and not in a Court Temporall.* Therefore[6] *if a termor of certaine land bequeath his croppe, and die, the Spirituall Court ſhall hold plea thereof.* Likewiſe,[7] *where one ſued in Court Chriſtian, for goods deuiſed by teſtament, which another claimed by deede of gift, and thereupon brought a prohibition, and ſhewed the deed of gift, and alledged withall, that the defendant was neither executor nor adminiſtrator: yet becauſe it was by name of a legacie, it was adiudged to belong to the Spiritual court, by which it was to be determined, and the circumſtances to be tried, whether the deuiſe were good or not.* And in reſpect, a man hath ſuch action againſt the executor for a legacie before the Eccleſiaſticall Iudge, therefore *the*[8] *legatarie or deuiſee may not of his owne head, take the goods or chattels deuiſed to himſelfe, out of the poſſeſſion of the executour.* And for this alſo eſpecially, becauſe[9] *the Lawe doeth not binde*

[5] 37.H.6.pag.9.

[6] H.8.H.3.ex Fitzh.tit.prohib.19.

[7] 46.E.3.fol.38.

[8] M.20.E.4.9.

[9] T.2.H.6.15.

that the legacies shall be assigned, payed, or deliuered, vntill the debts of the testatour be satisfied and payed: But because [1] *a franke tenement or inheritance deuised, is not demaundable in an Ecclesiasticall Court, but in the Temporall: therefore the* [2] *legatarie (according to the deuise) without further assignment or deliuerie, may enter into them, after the death of the testatour.*

1 Bracton. lib. 5. cap. 16.

2 Perkins tit. deuises.

If a man [3] by his testament do bequeath goods to the fabricke of a Church: for this legacie the executors may be sued in court *Ecclesiasticall.* Also, *if* [4] *wardship or chattels reall (as a lease) be bequeathed by will; a man may sue for them in the Court Ecclesiasticall, but not so for lands deuised.*

3 Reg. in br. orig. pag. 48. b.

4 Liberties of the Clergie, by the Lawes of the Realme, by Iohn Gooddall. Printed by *Rob. Wier, tempore Hen.* 8.

If a [5] *testatour* by his testament *doth charge his executors to pay his debts: the creditours (in respect of such charge) may sue for them in the Court Ecclesiasticall. When a* [6] *man* (as I doe interprete it, being executour or legatary, and so enioyned by will) *doth refuse to collate or erect a Grammer Schoole, and is therefore sued in a Court Ecclesiasticall, if he purchase a prohibition: the other partie shall haue a consultation.*

5 Ibidem.

6 Ibidem.

Touching committing of administrations, by the very statute whereby they were established it is enacted, that [7] *where a man dieth intestate, the Ordinaries shall depute the next and most lawfull friends of the dead person intestate, to administer his goods: which deputies, as they haue action against others in the Kings Court, for to recouer the debts owing to the dead, so in that Court there lieth action against them, for such as the dead did owe: but they are made accountable to the Ordinaries, as executours be, in the case of testament &c.* And [8] *when such letters of administration be shewed vnder the Ordinaries seale, or when a testament is so shewed, a man hath no direct trauerse against it, in the Temporall Court.*

7 31. Ed. 3. ca. 11.

8 36. H. 6. 31. referente Perk. tit. testa.

That to *sequester* the goods of an intestate, cõmonly called letters *ad colligendum*, belongeth to the *Ordinary*, appeareth by this case: *If an* [9] *Ordinary sequester the goods of an intestate to another man, and a third disturbeth, here the Ordinary hath an action of trespasse at the Common law, though the sequestration be a spiritual acte, because he had possession: yet he cannot haue an action of debt, albeit actions of debt in this case runne against him. But if the Ordinary do sequester the goods* (ex officio, *or for any contumacie*) *which giueth no possession to him, there the Spirituall Court shall haue iurisdiction.*

9 7. H. 4. 18.

That

That *diuorces* are of Spirituall iuriſdiction, is apparant by many bookes at the *Common* Lawe, needleſſe to be rehearſed: but whereas *prohibition*[1] lay in *Corbets* caſe vpon a ſuite brought in the *Spiritual* court, to repeale a *diuorce*, and cõſequently to make the iſſue of the ſecond wife baſtards, whereupon no *Conſultation* would be graunted (which may therefore ſeeme to make this point doubtful) it was not, for that the Court *Eccleſiaſticall* might not hold plea of *diuorces:* but the *prohibition* lay, *becauſe the title and diſcent were compriſed in the Isbell:* and this was agreed to be the cauſe, by the Court: and ſo it is[2] reported by *Brooke*. And *if a man giue goods in*[3] *mariage with a woman vnto the husband, if they be afterward diuorced, it was holden, that the woman diuorced may wel ſue for thoſe goods in Court Chriſtian.* But if any further doubt ſhould (herein) vpon the former caſe of *Corbet* remaine: That ſtatute which[4] affirmeth, that *diuorces (by appellation) were caried forth of this Realme vnto Rome, like as other cauſes Eccleſiaſticall of teſtament, of matrimonie, of right of tithes, oblations, and obuentions,* and appointeth how delegates (vpon ſuch appellations made) ſhall determine them all within the Realme, doth put it cleare out of doubt.

1 12.H.7.24.

2 Brooke tit. prohib. nu. 9.

3 T.13.H.3. referente Fitzh. tit. Prohib. nu. 21.

4 24.H.8.ca. 12.

Likewiſe where it is affirmed by a farre elder ſtatute, that *Ordinaries are*[5] *both to certifie and trie of baſtardie and bigamie*, which (for the moſt part) cannot be done, without the conuſance of *diuorces*, whereupon the former (eſpecially) doth depend.

5 18.Ed.3. pro Clero cap. 2.

As for[6] queſtions touching *Baſtardie* or *Legitimation* of any, it appeareth that at the *Common* Lawe, they do belong to a court *Eccleſiaſtical*; and vpon a writ, are to be certified into the *Queenes* Courts, by the *Biſhop*. If[7] a man be ſpoyled of the poſſeſſion of his wife: ſo farre forth as the Action doth but extend to be reſtored to her poſſeſſion; it muſt be handled in a Court *Eccleſiaſticall:* notwithſtanding ([8] ſayeth *Gooddall* in the Booke aforeſaide) that a man for his wife onely, may haue Action of treſpaſſe at the *Common* Lawe; and alſo a writte, *de vxore abducta cum bonis viri.*

6 Regiſt. in bre. iudicialibus, pag. 5.a. & 26.a.

7 Regiſt. in bre. iudic. pag. 53.a.

8 Goodall, of the liberties of the Clergie, by the Lawes of the Realme.

Alſo for a man that liueth aſunder from his wife, there lyeth Action in a Court *Eccleſiaſtical*, for him to receiue her againe and to cohabite with her; as may be gathered by[9] that ſtatute of *Weſtminſter* the ſecond; where it is prouided; that *a woman eloped from*

9 13.Ed.1.c.34.

from her husband, ſhall looſe her dower: except the husband (without compulſion Eccleſiaſticall) doe receiue her againe. Therefore for a man to receiue his wife againe, *compulſion Eccleſ.* may (in ſome caſe) be vſed, with allowance of the ſtatutes of this Realme.

Laſtly, it remaineth to ſhew here when, and howe, *goods and chatels promiſed with a woman in marriage* (after the marriage accompliſhed) be *demandable* and *determinable* in the Court Eccleſiaſticall. For beſides one or two caſes afore rehearſed, where (by the way) ſo much is implied, it appeareth by many conſonant iudgements in the very point. For *if a* [1] *contract be made betweene two men, that if the one will take to wife the others daughter, then he will giue him tenne pounds: In this caſe, if the money be to be demaunded, it ſhall be demaunded in the kings Court: becauſe hee did not promiſe the money with his daughter in mariage, but by way of conenant, that he ſhould marry his daughter. But if he had promiſed the money with his daughter in marriage, then it ſhoulde haue bene demaunded in Court Chriſtian.*

[1] 22. Aſſiſarum fol. 70. per Thorpe cui concordat M. 16. H. 3. per Fitzh. proh. 12.

Likewiſe [2] *in an action of debt, the plaintiſe declared, that he had married the daughter of the defendant, and that he ſhould haue twentie pounds in reſpect thereof: and by agreement of all the Iuſtices of the Common Plees, without any anſwere of the defendant, it was decreed that the plaintife ſhould haue nothing vpon his writ, becauſe it is determinable in a Court Chriſtian, and is of the ſame nature, as the very marriage is.* So doth [3] *Brooke* alſo collect out of the *Regiſter*, that *for marriage money and penſions, the ſuite lieth in the Spirituall Court:* and agreeable to the former diſtinction of *Thorpe, Fitzherbert* [4] alſo reporteth it in his *Noua natura brewium*. *Bracton* in like maner affirmeth it, [5] and yeeldeth a reaſon thereof: for hee (ſpeaking of Eccleſiaſticall iuriſdiction) ſaith thus: *Sic de rebus datis vel promiſſis ob cauſam matrimonij principaliter: & ſic de rebus quæ accidunt matrimonio, vt ſi pecunia promiſſa fuerit ob cauſam matrimonij: quia eiuſdem iuris, id eſt iuriſdictionis, eſſe debet acceſſorium, cuius eſt principale.* And albeit *Brooke* [6] in his abridgement report, that the ſame was alſo elſe-where holden by [7] three, *viz. Chocke, Towneſend* and *Littleton:* yet hee himſelfe ſeemeth to doubt of it, and ſaith there is alſo great [8] opinions againſt it, *becauſe there is quid pro quo*, and therefore likely to be determinable in a Temporall Court.

[2] 14. Ed. 4. 6.

[3] Reg. fol. 46. & 48. per Brooke tit. prohib.

[4] Fitzh. no. na. br. tit. proh. fol.

[5] Bracton. lib. 5. cap. 16.

[6] Brooke tit. iuriſdict.

[7] 17. E. 4. fol. 4.

[8] 37. H. 6. fol. 9.

Therefore

Therefore it may probably bee thought that theſe opinions which hee ſpeaketh of in this behalfe *37. Hen. 6.* either were meant in ſuch a caſe, as grewe to a lay contract, ſuch as *Thorpe* ſpeaketh of in the booke of *Aſſiſes* (afore alleaged) or elſe there was ſome couenant for the money, by deede. For [1] *in an Action of debt brought vpon a couenant by deed, that if the plaintife ſhould marry the defendants daughter, the defendant ſhould giue him an hundred pounds, which condition of marriage the plaintife had performed: it was adiudged, that (notwithſtanding Articuli Cleri) the matter did belong to the Temporall Court, becauſe it was by deede: but it had not belonged to it, but to the Court Eccleſiaſticall, if it had bene without deede.*

[1] 45. E. 3. fol. 24. per Br. iuriſdict. 11.

And the rather may it be thought, becauſe this hath bene taken for Lawe both afore and ſince; notwithſtanding thoſe opinions mentioned by *Brooke.*

Firſt in the [2] *Regiſter* wee finde to this effect, a certaine woman in conſideration of Matrimonie to be contracted with her daughter promiſed 40. marks: the Matrimonie was accordingly celebrated: the woman dieth, making *executours.* Then for not paiment thereof the husband bringeth his Action in the Court *Eccleſiaſticall:* the *executours* obteine a *prohibition:* whereupon, the matter comming to ſcanning; a Conſultation is neuertheleſſe graunted; whereby is affirmed, that the *Eccleſiaſticall* Court may lawfully proceede therein.

[2] Reg. in Br. orig. pag. 46. b.

Yea, and long after theſe opinions deliuered, *Fitzherbert* affirmeth, that ſuch ſuite belongeth to the Court *Eccleſiaſticall*, as hath bene alleadged. And ſo doth the little *Treatiſe of the liberties of the Clergie, by the Lawes of the Realme*, in theſe [3] wordes, viz. *If he that promiſed money with his daughter in marriage, dieth: hee that married her, may ſue the executours for the money, in the Spirituall Courts.* There is in the ſaide little *Treatiſe*, another caſe touched & affirmed to be of *Eccleſiaſticall* coniſance; which belongeth to this Chapter. It is [4] this: *If a man* (ſaith hee) *giue goods with his daughter in marriage, and after there is a Diuorce: the ſame may ſue for thoſe goods in Eccleſiaſticall Court.* But hee ſheweth not whether vpon any *Diuorce* whatſoeuer, the goods be there recouerable, viz. whether, aſwell when the *Diuorce* aroſe of the womans adulterie; as when it grew vpon ſome conſanguinitie

[3] Goodall, of the liberties of the Clergie.

[4] Ibidem.

ſanguinitie or other *Canonicall* impediment, founde out after mariage. Hitherto concerning thoſe kindes of Iuriſdiction *Eccleſiaſticall*, which I adioyned to cauſes *Teſtamentarie* and *Matrimoniall*.

CHAP. IIII.

Generall proofes out of Statutes, that ſundry other cauſes beſides Teſtamentarie or Matrimonial, are of Eccleſiaſtical conuſance.

BEfore I proceed further to ſhewe (in particular) what matters beſides be of *Eccleſiaſticall* coniſance and Iuriſdiction, and how farre; I holde it nothing amiſſe to ſhew (in ſome *generalitie*) firſt; that there are ſome other ſuch, which be neither *Teſtamentarie* nor *Matrimoniall*, nor yet any way depending, or of affinitie to them. The *Great Charter* (to the obſeruation and propugnation whereof, the King and the great Nobles and Officers were wont to be ſworne) layeth this groundworke of all which followeth: *We haue granted to God, and by this our preſent* [1] *Charter confirmed, for vs and our heires for euermore; that the Church of England ſhalbe free, and ſhall haue all her whole rights and liberties inuiolable.* But that the Church had theſe *rights* and *liberties* then, (which are now claimed) the *Actes* of *Courtes Eccleſiaſtical* in thoſe and former times, and in all ſucceeding ages, (without *prohibition*, or other oppugnation,) with the ſtatutes and reports, (ſome whereof were made not long after) and ſo from time to time downeward (till theſe late challenges) doe make it very manifeſt.

[1] Mag. Chart. cap. 1.

It is prouided by Statute; that [2] *the Chancellor or chiefe Iuſticer of the King, vpon ſight of the libell whereupon any prohibition is brought (if the caſe cannot be redreſſed by any Writte out of the Chancerie, but that the Spirituall Court ought to determine the matter) ſhall write to the Iudges (where the cauſe was firſt mooued) to proceede; the prohibition directed, notwithſtanding.* So that, wherein ſoeuer (by cuſtome and liberties of *Holy Church*) *Iudges Eccleſiaſticall* were wont to proceede; if no Writ lie thereupon in *Chancerie*, they may ſtill holde plea, and take conuſance.

[2] 24. Edw. 1. ſtat. de conſultatione.

Alſo

Alſo in the concluſion of the Statute of *Articuli*[1] *Cleri*, where fundry matters beſides *Teſtamentarie* and *Matrimoniall* are mentioned, it is thus enacted: that the *Prelates, Clergie, and their ſucceſſours, ſhall vſe, execute, and practiſe for euermore, the Iuriſdiction of the Church, in the premiſſes; after the tenor of the anſweres aforeſaid, without quarell, inquieting, or vexation of our heires, or any of our Officers, whatſoeuer they be.*

[1] Artic. Cleri. 9. Ed. 2. ca. 16.

Likewiſe *it is* by Parliament[2] *accorded, that the Miniſters of holy Church, for money taken for redemption of corporall penance, nor for proofe and account of Teſtaments, or for trauaile taken about the ſame, nor for ſolemnitie of marriage, nor for* other things *touching the Iuriſdiction of the Church, ſhall not be empeached nor arreſted, nor driuen to make anſwere before the Kings Iuſtices, nor other Miniſters: and thereupon ſhall haue Writs in the Chancerie, when they will demaund.* Where we finde, that *other things* beſides *Commutations*, matters *Teſtamentarie* and *Matrimoniall*, doe belong to the Iuriſdiction of the Church.

[2] 15. Ed. 3. ca. 6.

And to like effect after, in the ſame Kings dayes:[3] *Commiſſions to enquire of Iudges of Holy Church, whether they made iuſt Proces or exceſſiue, in cauſes Teſtamentarie and others, which notoriouſly pertaine to the coniſance of Holy Church, were from thenceforth forbidden.* Therefore, theſe Statutes being ſtill in force, if *Iudges Eccleſiaſticall* ſhall be found but to deale as they ought, in matters appertaining meerely to *Iuriſdiction Eccleſiaſticall*; how the vexations, impeachments, driuings to anſwere, and ſtrange enquiries againſt them, (vſed in ſome places) may be iuſtified by Lawe; is worthie the conſideration of thoſe, that are, or ſhall be procurers therein.

[3] 18. Edw. 3. pro Clero, c. 6.

In a ſtatute of King[4] *Richard* the ſecond, mention is made, that *the purſuites for Tithes, and for ſome other cauſes, of right ought, and of olde times were wont, to pertaine to the Spirituall Court.* In a Statute of King *Henrie* the eight it is[5] teſtified, that *both the authorities and Iuriſdictions Spirituall and Temporall, doe conioyne together in the due adminiſtration of Iuſtice, the one to helpe the other:* And that *the Lawes Temporall are for triall of propertie of landes, and goods, and for the conſeruation of the people of this Realme in vnitie and peace, without rauin and ſpoyle.* And in

[4] 1. Ric. 2. ca. 3.

[5] 24. H. 8. c. 12. in the præamb.

the bodie of the Statute are particularly named and reckoned for *Eccleſiaſticall*, (beſides cauſes *Teſtamentarie* and *Matrimoniall*,) theſe, viz. *diuorces, right of tythes, oblations, and obuentions*, of which it is affirmed, that *the knowledge of theſe cauſes by the goodneſſe of Princes of this Realme, and by the Lawes and cuſtomes of the ſame, appertaineth to the Spirituall Iuriſdiction of this Realme.* And becauſe by that Statute, remedie was onely prouided, that appellations in thoſe aforeſaide caſes ſhould not be proſecuted out of the *Realme:* (there being alſo many other cauſes of *Iuriſdiction Eccleſiaſticall*, wherein a like remedie was conuenient to be had) therefore the next yeere after it was enacted, that [1] *all maner of appeales, of what nature or condition ſoeuer they bee, or what cauſe or matter ſoeuer they concerne, ſhall bee made and had by the parties grieued, &c. after ſuch maner, as is limitted for cauſes of appeales, in matters Teſtamentarie, Matrimoniall, tythes, &c.* in the ſaid former ſtatute mentioned.

[1] 25. H. 8. c. 19.

In a Statute of King [2] *Edward* the 6. (beſides matters of *voluntarie Iuriſdiction* Eccleſiaſticall, as *collations, preſentations, Inſtitutions, inductions, letters of orders and dimiſſories*) are reckoned in generall as Eccleſiaſticall, *all ſuites and cauſes of inſtance betwixt partie and partie, and all cauſes of correction:* And in particular, *all cauſes of baſtardie, or bigamie, and enquirie* De Iure patronatus: beſides *matters of Teſtament, of adminiſtration, or of accounts vpon them.* And [3] in one Statute in her Maieſties reigne, are reckoned in particular (as the more grieuous ſort of matters of correction in Eccleſiaſticall Courtes) *hereſie, refuſing to haue a childe baptized, or to receiue the holy Communion, or to come to diuine ſeruice, errour in matters of religion or doctrine now receiued, incontinencie, vſurie, Simonie, periurie in the eccleſiaſticall Court, and Idolatrie.* And therefore Iudges Eccleſiaſticall may lawfully cite men, in certaine other cauſes, beſides *Teſtamentarie* or *Matrimoniall:* and ought not *(economiue tantùm)* to be vexed, vnquieted, impeached, driuen to anſwere, or arreſted.

[2] 1. Ed. 6. c. 2.

[3] 5. Eliz. c. 23.

(***)

CHAP.

CHAP. V.

That ſuites for title of Benefices vpon Voidance or Spoliation: likewiſe that ſuites for tythes, Oblations, Mortuaries, &c. for Penſions, Procurations, &c. are of Eccleſiaſticall Iuriſdiction, is prooued by ſtatutes.

MAtters and ſuites for the title of Benefices *eccleſiaſtical* (ſo they touch not the trial of *the patronage*) do belong alſo to the knowledge and iuriſdiction of a court *eccleſiaſtical*, by the lawes of the Realme. For *coniſance of voidãce of benefices*, [1] *and the diſcuſſing thereof*, de iure *doe belong to Iudges of holy Church, and not to the Lay Iudge.* [1] 25. Ed. 3. pro Clero, ca. 8.

The Common [2] *lawe doth mention fiue cauſes of auoidance of a benefice*, viz. *death, reſignation, deprtuation, creation, and ceſſion.* But whether it may be deemed void in law, vpõ any of the laſt foure meanes of auoidance: is by the law *eccleſiaſticall* determinable. [2] Treatiſe of conſtitu. Prou. & Legatine. ca. 9. printed by *Tho. Godfrey*, tempore H. 8

And by the bookes of the *Common* lawe, [3] *whether the Church be full or not full, or the Clerke able or not able, is triable in an eccleſiaſticall Court.* Townesend. [3] M. 22. Edw. 4. fol. 24.

For if an [4] inferiour *Ordinary* ſhal differ or refuſe *to admit or inſtitute a Clerke preſented*, and the Clerke bring his *double Querele* (being of the nature in ſome ſort of an *appellatiõ*) from the *Archbiſhops* court: and *the aduerſe parte doe bring a prohibition, the ſaid Clerke may haue herevpõ his conſultation*, ſo that the court *eccleſ.* by colour hereof, deale not with the *right of patronage of the benefice.* [4] Regiſt. in br. orig. pag. 55. b.

Likewiſe *for ſpoliation of a* [5] *benefice, a man is to be ſued in Court Chriſtian.* But this *lieth not, but where a Clerke is in, as an incumbent. for if he be in, as an vſurper of the Church being full, or as a treſpaſſer, there lieth action of treſpaſſe, and not ſpoliation.* But *if two* [6] *incumbents be in, and the one claimeth by one patrone, and the other by another, there lieth no ſpoliation: but where both claime to be in by one patrone, or by meanes of one patrone, then lieth action of ſpoliation, and not otherwiſe. For where the right of Aduouſon may come in queſtiõ, there lieth no ſpoliation, for that cannot goe to a Spirituall Court.* And againe a litle after: [7] *Spoliation and debate vpon an appropriation, ſhalbe determined in the Spirituall Court.* [5] 44. Ed. 3. 33. [6] 38. H. 6. 19. [7] 38. H. 6. 20.

Touching tithes where they are to be ſued, it appeareth by
[1] 13.Ed.1.ca.5. Weſtm.2. actes of Parliament thus: *The* [1] *plea for tithes ſhall paſſe in the court Chriſtian, as farre foorth as it is deraigned in the Kings court.* In the
[2] 9.Ed.2.ca.1. Artic.Cleri. next Kings [2] dayes, thus: *In tithes, oblations, obuentions, mortuaries, (ſithence they are propoſed vnder theſe names) the Kings prohibition*
[3] Ibidem cap.5. *ſhal holde no place.* [3] And againe, *the Kings prohibition ſhal not lie for tithes of a Mill, newly erected.*
[4] 1.Ric.2.ca.13. Likewiſe in the dayes of *K. Richard* the 2. it is thus [4] conteined in a ſtatute: *The Clergie complaine for that the people of holy Church purſuing in the ſpiritual court for their tithes, and their other cauſes which of right ought, and of olde times were woont to perteine to the ſpirituall court, and that the Iudges of holy Church hauing coniſance in ſuch cauſes, and other perſons thereof medling (according to the lawe) be malitiouſly endited, &c. and by ſecular power oppreſſed, and be forced by oathes, obligations, and many vndue meanes compelled to ceaſſe vtterly, againſt the liberties & franchiſes of holy Church: It is enacted, that ſuch obligations made by violence ſhould be voide: and the enditors of malice when the enditees be acquit, ſhould incurre the paine of thoſe that procure falſe appeales, &c.* Likewiſe the pre-
[5] 23.H.8.ca.9. amble of a [5] ſtatute in *K. Hen.* the 8. dayes doeth argue, that matters of *tithes* are to be heard and determined by Iudges *Eccleſiaſticall.*
[6] 24.H.8.ca.12. The ſame is alſo proued by that, where in [6] another ſtatute it is ſaid thus: *Inconueniences haue ariſen by reaſon of appeales out of the Realme to the See of Rome, in cauſes teſtamentarie, cauſes of matrimonie, and diuorces, right of tithes, oblations, and obuentions.* And in
[7] 27.H.8.ca.20. [7] the preamble of another ſtatute, *Deteiners of tithes, purſuing ſuch their deteſtable enormities and iniuries, haue attempted in late time paſt, to diſobey, contemne and deſpiſe the proceſſe, lawes, and decrees of the eccleſiaſticall courtes of this Realme, in more temerous and large*
[8] Ibidem. *manner, then before this time hath bin ſeene.* And therefore it [8] was then enacted, that *for ſubtraction of tithes, offerings, and other duties of holy Church, the partie grieued, may by due proceſſe of the kings eccleſiaſticall lawes of the Church of England, conuent the perſon offending, before the Ordinarie, and alſo compell him to yeelde their ſaide duties.* And likewiſe *for any his contempt, diſobedience, or other miſdemeanor, vpon complaint to any of the Counſell, or to two Iuſtices of the peace, to haue him committed, vntill he ſhall be bound to*

giue

gine due obedience to the proceſſe, proceedings, decrees, and ſentences of the eccleſiaſticall court of this Realme. And [1] afterward by another ſtatute of the ſame King, it is enacted, that *for denying to ſet out tithes, for deteining, withholding, or refuſing to paye tithes or offerings, Ordinaries may proceede according to the courſe and proceſſe of the eccleſiaſticall lawes.* And in the [2] preamble thereof, it is directly affirmed, that *by order of the common lawes of this Realme, a man cannot haue any due remedie againſt deteiners of tithes.* And the [3] like alſo appeareth by the ſtatute of *tithes*, made in *K. Edwardes* reigne.

[1] 32.H.8.ca.7.
[2] Ibidem.
[3] 2.Ed.6.ca.13.

That which is afore affirmed and determined, concerning *tithes, oblations, obuentions*, and *mortuaries*, may likewiſe be ſaid of *penſions, portions, corrodies, procurations, indemnities*, and other ſuch dueties *eccleſiaſticall*. For it is enacted, that [4] for theſe denied, *eccleſiaſticall perſons themſelues, may make ſuch proceſſe againſt the perſon denying, or againſt the Church charged, as heretofore they haue lawfully done, and as by, and according to the lawes and ſtatutes of the Realme, they nowe lawfully may doe. And the perſon conuict, (according to the eccleſiaſticall lawes) ſhall pay to the plaintife, the things recouered, and his coſtes.*

[4] 34.& 35.H.8. ca.19.

CHAP. VI.

That ſuites for right of tithes belong to the eccleſiaſtical Iuriſdiction, and how farre, is ſhewed out of the bookes and reportes of the cõmon lawe: ſo of places of buriall and Church-yardes, and of Penſions, Mortuaries, Oblations, &c.

THe reportes of iudgements and opinions of the Courtes at the *Common* lawe (conteyned in the bookes of termes and yeeres) called booke-caſes, and other treatiſes of that lawe, are no leſſe plaine & pregnant in this matter. *An* [5] *attachement vpon a prohibition was ſued againſt a plaintife in a Court Eccleſiaſticall, ſurmiſing that he did ſue there for hay and money, which touched neither matrimony nor teſtament: but vpon ſhewing the libel, which proued, it was for tithes & oblations, a conſultation was granted, for the ſpiritual court to proceede.* And [6] *where the right of tithes is in queſtion, it is triable in the Court ſpiritual.* Likewiſe, [7] *ſo ſoone as it appeareth, that the right of tithes comes in debate, the Lay court ſhal ceaſe, & ſhalbe out of iuriſdiction:* quod fuit conceſſum.

[5] M.44.Edw.3. fol.32.
[6] M.22.Ed.4. fol.14.& paſſim alibi.
[7] 38.H.6.fol.21.

The

[1] 22.Assi.fol. 75.

The same is testified in the booke of Assises: [1] *For if the Kings patentee of tythes renewing in a Forrest, that is in no Parish (in which case the tythes doe belong to the King) haue cause to sue any, that ought to yeelde tythes, and ought to seuer them from the nine partes; such suite shall goe to the spirituall Court.*

[2] Prohibition. consultation. 2.

In the booke of *Entrees* in the precedent of a [2] *consultation* graunted, it is thus said: *In causis de decimis, de testamento, vel matrimonio, quando sub eo nomine proponuntur, prohibitioni Regia non est locus.* And so [3] *Bracton* saith: *Non pertinet ad Iudicem secularem cognoscere de ijs quæ sunt spiritualibus annexa; sicut de decimis, & alijs Ecclesiæ prouentibus.* [4] And againe afterward: *Mutatur quandoq; iurisdictio de iurisdictione in iurisdictionem, mutatis rerum nominibus, vt si de Laico catallo fiat spirituale, (vt cùm res fuerint decimatæ) fiunt de Laico catallo res spirituales, & sic mutatur iurisdictio secularis in spiritualem.* And therefore where it is reported in the booke of *Assises*, 38. pag. 20. that *the Exchequer held plea in matter of tythes betwixt two parsons of Churches, because the one was the Kings debtour; it is* [5] *said, that neither of the Benches would haue done it, and that it was a marueile.*

[3] Bracton lib. 5. cap. 2.

[4] Bracton lib. 5. cap. 16.

[5] Brooke tit. Iurisd. 9.

It appeareth in the *Register* by [6] sundry *consultations* graunted after *prohibitions* brought, that at the *Common* lawe, so declared and confirmed by *Articuli cleri*, tithes are of *ecclesiasticall* conisance. And it is alledged [7] truely out of the *Register*, that for tithes happening due in time of vacation of a benefice, the Iudge *ecclesiasticall* may cite *ex officio*. More particularly, sundry kindes of tithes are there expressed; which by *consultations* were prooued and allowed to belong to the determination of an *ecclesiasticall* Court. As first [8] tithe of wooll rising of sheepe killed or dead. Againe, [9] tithe of calues & *lacticiniorũ*, that is, of milke, butter, & cheese, (as it may be gathered by another *consultation*) are both due to be paide, and demaundable in a court *ecclesiastical*. Thirdly, another [10] *cõsultation* cõteineth, not only butter, cheese, & *lacticinium*, to be due and demandable in court *eccles.* but also of *pannage*, that is, tithe of maste, & of coltes. To these doth *the Treatise of the* [11] *liberties of the Clergy* adde *tythes* for hony, & waxe of bees. But why he should say further, that *it seemeth all these must be by prescription*, as if tithes of all kindes were not *ipso iure* due, sauing when some lawe doeth otherwise specially limit and determine:

[6] Regist. in br. orig. pag. 45. b. 46. 47. b. 48. b.

[7] *Goddall* of the liberties of the Clergie. Regist. pag. 51. a. b.

[8] Reg. pag. 48. b.

[9] Reg. pag. 48. a.

[10] Reg. pag. 49. a.

[11] *Goddall* of the liberties of the Clergie, by the lawes of the Realme.

I must

I muſt confeſſe, ỳ I can ſee no *ſeeming*, nor yet colourable reaſon.

And not onely the *partie* himſelfe who deteineth tithes may be ſued, but if he die, his *executors* may be ſued alſo for them in court *eccleſiaſticall*. For ſo is it [1] teſtified by a *Conſultation* obteined for tithe of Wooll, denied by the Teſtator, and by his *executors* who brought the *prohibition*. And the [2] like is teſtified by the ſaid treatiſe *of the Liberties of the Clergie*, touching *tithes* of *Mils*.

[1] Regiſt. in br. origin. pag. 48. a. & Gooddall ibidem.
[2] Gooddall ibid.

Whereas alſo for reſtraint of the malice of diuers, a prouinciall conſtitution was made by the *Biſhops* of the *Prouince* of *Canterbury*, in their *Synode* at *London*, that ſuch as hindered the gathering or cariage of *tithes*, by due and accuſtomed wayes ſhould be excommunicated *ipſo facto:* It happened that a parſon bringing his action in court eccleſiaſticall vpon that conſtitution; was hindered and ſtaied by *prohibition*, ſuggeſting that it was inſtituted touching *debts* and *chattels*, being neither *Teſtamentarie* nor *matrimoniall*. But the *conſultation* [3] granted, doeth ſignifie; that the court eccleſiaſticall may lawfully proceed in that plea, ſo farre foorth as the action reacheth but to the *excommunication* of the partie, by reaſon of his hindering the *Parſon* to gather and carie *tithes*, by places due and accuſtomed, ſo that the ſaid *conſtitution* and ſuites eccleſiaſticall thereupon brought, be both allowable.

[3] Reg. p. 46. b. & 47. a. & Gooddall of the Liberties of the Clergie.

Yet we are to vnderſtand, that neuertheleſſe in ſome caſes, the ſuite for tithes doeth not lie in an eccleſiaſticall court: as for example, where it is otherwiſe determined by ſtatute. For it is prouided, that [4] where *a man is ſued in a court Eccleſiaſticall for tithes of great trees aboue 20 yeeres growth, which may ſerue for timber of ſhips or houſes, the kings prohibition ſhall lie*. But it was [5] agreed in the *Parliament* at *Sarum*, that a *conſultation* lieth for *Sylua cædua*, albeit it renew not yeere by yeere.

[4] 45. Ed. 3. ca. 7.
[5] Reg. in br. origin. pag. 49. a. in Notabili. Brooke tit. Conſultat. 11.

It was alſo [6] adiudged in the caſe betwixt *Sobie* and *Mullins*, that *of hornebeames, Sallowes, and ſuch like trees, (that are of ſo baſe nature that they ſerue not for building, nor are of any endurance, and ſeruing for fewell and other meane vſes) tithes ſhould be paied, not onely of the trees themſelues, but of their boughes when they are lopped, of what age ſoeuer they be*.

[6] Plowden. 17. Eliz. inter Sobie & Mullins.

The [7] opinion of the Court in this caſe then, further alſo was, that *if the tree it ſelfe by that ſtatute* (being but an affirmance of the *Common* lawe afore) *bee priuiledged for tithes, as Oke, Aſhe,*

[7] Ibidem.

and ſuch like; that the armes & boughes alſo of them (being of twentie yeeres growth or aboue) ſhall be free likewiſe. And the reaſon is added, *for they may ſerue for ſome vſe in building.*

So that here it may be doubted, if trees aboue twentie yeeres growth, being of a kind *priuiledged* and *timberable*, as Oke, Aſhe, Elme, &c. be of themſelues ſo little, ſo crooked, or ſo rotten, as that they can ſerue for nothing but blocks and fewell, and be alſo ſo emploied: whether thereof tithes ſhall be paied, and bee demandable in a Court *eccleſiaſticall?* For here the reaſon of that iudgement doeth ceaſe, becauſe they ſerue not for any vſe in *building, & ceſſante ratione, ceſſat lex.*

[1] T.11.H.4. fol. 242. This doubt is alſo enforced by the opinion [1] of *Askham:* who to maintaine the *prohibition* there brought (though the ſuite in the *eccleſiaſticall* court were for *great wood*) was driuen to auerre, *that they were ſuch great trees as might ſerue to build an houſe ſufficient for any mans dwelling, according to the cuſtome of the Countrey.* Which allegation of matter in fact had not needed, if onely the kind and age of the trees had bene to be reſpected, to maintaine the *Prohibition.* But this queſtion is to be diſcuſſed by the reuerend and learned Iudges.

[2] Nota in Reg. pag.54.b. I doe find a *Note* in the *Regiſter*, but not ſet downe by whom nor when, touching immunitie of ſome things, from paying of *tithes*, to this [2] effect, viz. *Note, that the Iuſtices ſay, that tithes ſhall not be yeelded but of ſuch things as bring profite from yeere to yeere, and that by the memory of man; but this is againſt the Decretals,* ſaieth he. Now admitting this report to be true; what might be the reaſon of ſuch opinion of thoſe that were Iuſtices then, is not expreſſed; & I cānot coniecture. for not only the *Decretals* & *Canō* law, but Gods written law, & before that, ỳ law of nature (vnder which other thē ſuch *tithes* were paid) do ſeem to be againſt it: & thoſe *Iuſtices* had not (for any thing I can find) either former written law, or any report of vn writtē law or cuſtome to ỳ effect.

[3] Reg.pag.44. And if this ſhould be receiued for lawe, as is here in words laid downe; then need no tithes be paid of *Sylua cædua*; yet was it determined in the Parliament at *Sarum*, ỳ they ſhould: & ſo [3] it is at the Cōmon law alſo. And thē neither *perſonall tithes*, nor *tithes* of *Mils*, nor *tithes* of Licoras, nor of Saffron heads (being gathered commonly but once in 3. yeeres) nor tithes of corne out of fields

that

that lie fallow & without fruit euery other,or euery third yeere; nor tithe calues or lambes falling of ſuch cattell,as do bring forth but euery other yeere,nor tithe of fruit trees, that beare but one yeere in three. And if tame *elephants* (for cariage) were vſed as commonly here as in ſome other countries(which go with yong two or three yeeres together) by like reaſon no tithe of thē neither might at all be demanded, becauſe euerie of theſe are ſuch, as bring no profite from yeere to yeere.

Where alſo is added, that this yeerely profite muſt haue had his continuance by the whole memorie of man:hereby would be cut of all tithes of grounds newly ſtubbed vp & turned to good medow,paſture or arable, from great timber trees. Likewiſe all tithes of any new ſets and commodities; as of ſundry rootes, artichocks,oſiers,woad, rape-ſeed, hoppes, French wheate, and ſuch like, being in moſt places but of late knowledge and ſmall continuance,were wholy taken away. And ſo were all tithes of grounds lately left dry by the ſea, or by freſh waters, or wonne by the induſtrie of man.

The ſame *Note* further reporteth,that the Iuſtices opiniō then was :*that for tithes of pit-coles,quarries and other like, by no means a Conſultation ſhould be granted: becauſe Parſons tooke tithe of the blades that grew on the ground ouer them, & therefore they ſhould not take tithe of the coles.* This opinion(as it ſeemeth to me)that very *Note* miſliketh in theſe words: *But* (ſaith he) *by the like reaſon,a man ought not to pay tithe of agiſtment, becauſe hee yeeldeth tithe for the beaſts that feed in his paſture.* But I doe not well conceiue the trueth of that which he here inſinuateth: as if Agiſtment money were to be paied for the herbage of the ſame beaſts, which by their calfe,lambe,wooll or milke, doe bring commoditie to the Church. Yet if he meane that tithe of Agiſtment money is to be paid for barren cattel,though they depaſture in the ſame paſture where fruitful cattel do,& at the ſame time; then doeth he come neerer to the purpoſe of confuting that reaſon, which implieth thus much,that ſeueral kinds of commodities in one yere,ariſing out of one ground,ſhould yeeld but one kind of tithe. For if this were true, then where tithe of haie hath bene paied, nothing ſhould be yeelded for the after-math (commonly being halfe the value of the haie) though it bee depaſtured with cattell,

which bring no commoditie to the church: then alſo might not the vicar of *Tenham* in *Kent*, haue tithes (as he hath) of the fruit of the great Orchard in Sommer, becauſe he had tithe loppings of the trees in Winter, amounting to ſundry loades of fagot. And then alſo ſhould not the Church haue tithe fruite of ſuch great yong Orchards turned from tillage, as ſtill yeeld tithe corne, or haie growing vnder the trees for ſundry yeeres together.

If to theſe obiections it be ſaid, ẏ there is great diuerſitie; becauſe theſe examples do in deed import ſeuerall fruits & commodities to be taken; yet either at diuers times of the yeere, or elſe ariſing out of ſeuerall parts of the ground: for replie I ſay, that the like may be alſo ſaid of colepits & quarries, for ſo much of the groũd aboue as is digged, beareth at that time neither corne nor graſſe. And albeit for coles (when men be come to a certaine veine and depth) they vſe to dig ſide-long, leauing great pillars to ſupport the earth frõ falling: yet is it not the ſelf ſame part of the ground below where they dig, that beareth graſſe or corne aboue, and therefore herein no diuerſitie. And with like reaſon might tithe of the ſeed of Woad be denied, becauſe tithe of the leaues was afore paied: or tithes of Saffron heads, becauſe tithe Saffron was paied the ſame yeere. Yea, if this note were aſſured lawe, then ſhould no tithes be paied of any Minerals; as of lead, tinne, copper, quickſiluer, &c. how it goeth in *Cornewall*, *Deuonſhire*, and at *Mendiffe* hils in *Somerſetſhire* for tinne and lead, I haue not enquired. but I am aſſured, that in the *Peake* in *Darbiſhire*, tithe lead is the chiefeſt part of the Miniſters liuing, in ſuch places where it is gotten. Which I feare me would hardlie bee yeelded (as it hath bene by time immemoriall) onely of pure good will; if the lawe in that point were againſt the Miniſters. But the diſcuſſing and iudgement of theſe doubtes, I muſt referre wholie to the reuerend Iudges, becauſe they doe ſurpaſſe my ſlender skill.

[1] Tit. Prohibitiõ. It ſeemeth alſo by the booke of *Entrees*, that [1] *a prohibition lieth, where tithes of corne and wood bee ſued for in an Eccleſiaſticall Court, if an action of treſpaſſe bee thereupon depending afore at the*

[2] 38. Ed. 3. fol. 8. *Common lawe. De hoc quare.* [2] Likewiſe *if a man conenant to pay or ſet out his tithes truely, he muſt be ſued in a Temporall Court vpon this acte of conenant, and not elſe where.* Furthermore, tithes of corne,

corne,&c. may be conſidered either before they be ſeuered from the nine parts,in which [1] caſe, if all the corne be caried away (it is ſaid) the ſuite lieth in a ſpirituall Court: Or after ſeuerance; & then to carie the tithe away,after ſeuerance from the nine parts; is ſaid to be a *treſpaſſe* determinable at the Common law. But I finde (to mine vnderſtanding) great opinion againſt this: as [2] firſt *Bracton*, where he ſaith: *Cùm res fuerint decimatæ, fiunt de Laico catallores ſpirituales.* For *decimare* muſt needes be to tithe and ſet out from the nine parts. Secondarily the opinion [3] of the whole Court. For *vpon an action of treſpaſſe brought by a Parſon againſt the Vicar, the Vicar iuſtified,that he tooke them for tithes being ſeuered from the nine parts; and that he and his predeceſſours, time out of minde, had preſcribed them to be due: whereupon the Iudges (ex officio,* without petition of either partie) *diſmiſſed this plea, vnto the Spirituall court*; as not perteining to their iuriſdiction. *Soluat Apollo.* But it ſeemeth to me, that the [4] ſtatutes for tithes do now ſtint this ſtrife, and makes both caſes to be Eccleſiaſticall. *Vpon* [5] *corne carried away, whereupon it comes to be tried betwixt two Parſons of Churches, who hath right to the tithes; this triall belongeth to the ſpirituall Court, and is not vpon action of treſpaſſe, to be brought to the Common law.* And ſo it was adiudged; *albeit that the defendant there ſaid, that his Parſonage was then in leaſe. But if they* [6] *had ioyned iſſue, whether the place whence the ſheanes were taken, were in the one Pariſh or the other, then it ſhould haue bene tried at the Common law, becauſe* [7] *the bounds of a Pariſh ſhall be tried by the Countrey, as is there ſaid.*

1 38.Edw.3.6. 50.Edwa.3.10. 38.Edw.3.8.

2 Bract. lib. 5. cap.16.

3 M.22.Ed.4. fol.23.

4 27.H.8.ca.20. 32.H.8.cap.7. 2.& 3.Ed.6. cap.13.

5 14.H.4.17.

6 39.Ed.3.23. 5.H.5.10.

7 Brooke tit. Iuriſdict.

Yet in a litle *Treatiſe* [8] printed by *Thomas Godfrey* in K. *Henrie* the eights time, it is teſtified, that *it hath bene holden in times paſt &c. that the diuiſion and diſtinction of pariſh from pariſh, is a thing ſo meere ſpirituall, that no man may doe it but the Clergie.* which aſſeueration though he diſallow, if the *Clergie* claime it by any *immediate power giuen them from God:* yet (ſaith he) *of theſe and of diuers other things; it is no doubt, but they haue holden plea in times paſt; rather by a cuſtome and by a ſufferance of princes; then for that they be meere ſpirituall: or that they* of the Clergie, *had authoritie ſo to do, by any immediate power of the law of God.* So that he alloweth *diuiſion and diſtinction of pariſhes,* to haue bene (of olde) of *eccleſiaſticall* conuſance; though to be deriued from

8 An anſwere to a letter cap. 1. printed by Tho. Godfrey circa 26.H.8.

the *kings prerogotiue royall.* And it [1] appeareth by a *conſtitution prouinciall* made in a *Synode* at *Lambhith* holden vnder *Boniface* then Archbiſhop of *Canterburie*, in the yeere of Chriſt 1260, that the Clergie then (vndoubtedly) held, and ſo practiced, touching *limites parochiarum*; that they meerely belonged to the *court eccleſiaſticall.* And *Lindwood* comming 200 yeeres or thereabout, after him, in his Commentaries or Gloſſes therupon; maketh no doubt of it, but onely quoteth *Canon* law for it.

[1] Prou. conſtit. æternæ ſanctio. de pœnis. & ibi Lindwood verb. limitibus parochiarum.

If a Parſon grant to [2] *me by deed all the tithes of his benefice, and yet afterward he ſueth me in a Court Chriſtian, for the tithes of mine owne landes, whereupon I bring mine action of couenant in the Temporall Court; neuertheleſſe I ſhall not haue a prohibition, becauſe I may plead that matter in barre in the Eccleſiaſticall court.* Danbie *and* Chok.

[2] M.8.Edw.4. fol.13.

But *if a rent reſerued vpon a leaſe of tithes or offerings, be* [3] *ſued for in a Spirituall court, there lieth a prohibition, for this is a Lay rent:* and ſo *Bracton* [4] holdeth in the place before alleged agreeable to the ſtatute of *Articuli Cleri.* It is holden, [5] that *if a Patron hauing an Indenture to be quit of certeine tithes, be ſued in a Court Chriſtian for thoſe tithes, hee ſhall haue a prohibition.* But aske whether (this precedent of the *Regiſter* notwithſtanding) hee may not haue a *conſultation* by the opinion of *Danbie* and *Chok*, afore recited: and the rather in this caſe then in the former, by how much it is more to be preſumed to be a *Symoniacall compact* againſt him, that is Patron. For if it be not Symoniacall, he may plead this couenant in barre, in a *Court eccleſiaſticall*, aſwell as in the former caſe.

[3] 44.Ed.3.32.

[4] Lib.5.ca.16.

[5] Regiſt.fol.38.

The competencie of the Court for ſuite of tithes, dependeth alſo much vpon the conſideration of the parties, that contend for them. For [6] *in an action of treſpaſſe brought at the Common law, the defendant ſaid, that the corne, whereof the plaintife complaineth, was growing in D. which is parcell of M. where he is Parſon, and thereby he claimeth: And becauſe in the pleadings they were both named Parſons; the opinion of the Court was; that it was out of their iuriſdiction.* In another [7] *action of treſpaſſe brought againſt a Lay man that claimed by leaſe from another Parſon (notwithſtanding that by* M. 44. Ed. 3. *it was alleged, that the Kings Bench in ſuch caſe ſhall haue iuriſdiction, becauſe it is betweene a Lay man and a Parſon,*

[6] 38.Edw.3.6. 31.H.6.11.

[7] Hill.7.H.4. fol.35 per quoſdam libros, & 102. per alios.

Parſon, and that by Articuli Cleri *(by the contract)* tranſeunt decimæ in catalla: *yet becauſe it was of* tithes, *which they might reconer in Court Chriſtian,* Gaſcoigne *held; that the Temporall court ought to be out of iuriſdiction: for* (ſaid he) *though it had bin ſo done afore, yet it ſhall not be done ſo by vs here.* And of the ſame opinion was *Moile,* in another like action of *treſpaſſe:* that, [1] *betweene a Parſon and a Fermer of another Parſon, action for tithes lies in a Spirituall court, becauſe the Fermer claimes the tithes as due to himſelfe during his terme, which none gainſaid.* [1] 6.Ed.4.3.

But vpon the former of theſe two laſt caſes, *Brooke* [2] doth thus collect: that, *it thereby appeareth cleerely, that vpon contention for tithes betweene a Parſon & a Lay ſeruant of another Parſon, the Spirituall court ſhall haue iuriſdiction. For* (ſaith he) *the ſeruant doth claime to the vſe of his Maiſter, and not to his owne vſe, vpon any Lay contract.* Yet how this collection may ſtand together, with other iudgements elſe-where reported to be giuen, may mooue ſome doubt: For, *in* [3] *an action of treſpaſſe brought by a Parſon againſt the ſeruant of another Parſon: the ſeruant iuſtified for tithes of his Maiſter, and thereupon demanded iudgement, whether that Court would holde plea thereof: and it was not allowed, becauſe the ſaid defendant was a Lay man.* Likewiſe, [4] *it an action of treſpaſſe brought by a Vicar for corne, taken by the ſeruant of another Parſon, that claimed them as tithes of his Maſter; and the plaintife claimed them as tithes due to his Vicarage: it was adiudged by three, that the Court temporall had iuriſdiction, becauſe the plaintife had none action againſt the ſeruant, in a Court ſpirituall, at leaſt as is there affirmed.* [2] Brooke tit. Iuriſdict.82. [3] 31.H.6.11. 1.H.6.5. [4] 6.Edw.4.3.

Markham ſeemeth to be of opinion, that *if any* [5] *part of right of tithes do come in debate betweene two Patrons, that there the court Eccleſiaſticall can not holde plea.* And *if* [6] *the Lord of a Mannour claime tithes of certeine landes in D. to finde a Chapleine or Curate in D. therewith, and the Pariſhioners there claime thoſe tithes likewiſe for the ſelfe ſame end: It was deliuered for law, that the Lay Court ſhould haue iuriſdiction betweene them, and not the Spirituall Court.* [5] 38.H.6.19. [6] 25.H.8.vt refert Brooke tit. Iuriſdict.nu.95.

The laſt cauſe of drawing an action for *ſpoliation* of tithes from a Court *eccleſiaſticall*, that I finde, is: where the *tithes* in demand, do amount to a *fourth part* of the yerely commodity of the whole

whole benefice: becauſe hereby, the *right of Patronage*, may be touched or preiudiced; which *right of Patronage* is to be handled in a court *Temporall* onely, and by no meanes in *Eccleſiaſticall*. For ſo is it teſtified by [1] *Lindwood* himſelfe, to be the olde cuſtome of the Realme; and therefore the Common law of the land. But in another place he ſeemeth to be of opinion, that (this notwithſtanding) no preiudice towards the *Patronage* can grow, though the ſuite for all the whole tithes and oblations ſhould be proſecuted in court *Eccleſiaſticall*. *For* (ſaith he) [2] *the right of Patronage is founded vpon one of theſe three*, viz. *building, founding, or endowing of a Church. So that the right of Patronage doth no way reſpect tithes or oblations comming to the Church, but rather the building of it, the ground whereon it is ſituate, or the endowment (as of glebe &c.) aſſigned vnto it.* This he writeth *ſaluo iudicio meliori*: and vnder the ſame reſeruation, I do holde, that where a great part of tithes is (by ſuite) euicted from one Church vnto another; the very patronage it ſelfe is much preiudiced and endamaged. For if the Patron happen to ſell it, the leſſe value the benefice is of, the leſſe recompence ſhall he haue for it. Beſides, if [3] a *penſion* be aſſigned out of the benefice vnto the *Patron* (as it may be [4] vpon the foundation) the more the benefice is empaired, the more hard will the *penſion* be to recouer. Laſtly, forſomuch as the Clerke preſented is (by law) bound to relieue his *Patron* fallen in decay: in this reſpect, great preiudice groweth to the *Patron*, when a *fourth* or greater part of the benefice is euicted.

That which *Markham* held (as is aforeſaid) *viz.* that *if any part of right of tithes doe come in debate betwixt two Patrons, there the Court eccleſiaſticall could not holde plea*: ſeemeth to be borrowed from a *conſultation* in the [5] *Regiſter* in theſe words, *viz. we being not willing to haue any thing derogated from iuriſdiction eccleſiaſticall, do ſignifie, that you may proceed, according to the courſe of the eccleſiaſticall court, in the plea aforeſaid; ſo as the action reach but vnto ſpoliation of tithes; and not to the aduowſon or right of Patronage, of any part of the Church*: ſauing that he ſpeaketh of *the right of any part of the tithes*, and the *Regiſter* goeth to the *right of Patronage* it ſelfe, *of any part of the Church*.

But where [6] a *fourth* or greater part of *tithes* &c. is not in demand

[1] Lindwood c. æternæ ſanct. V. iure-patronatus. conſt. Prou. de pœnis. edita 1260.

[2] Lindwood in verbo quarta pars bonorum. c. 2. Prou. conſt. de foro competenti.

[3] Stat. circumſpectè agatis.

[4] Lindwood, vbi ſupra. V. penſionem.

[5] Reg. pag. 46. a.

[6] Stat. circumſpectè agatis.

maunde betwixt two *Parſons* of Churches, there the *Plea* goeth to the *eccleſiaſticall* court. The [1] booke of *Liberties of the Clergie*, hereof writeth thus: *one Parſon of a Church may ſue another in caſe of ſpoliation or taking of tithes or penſion, in court Chriſtian: ſo that the matter in demaund, amount not to a fourth part of the value of the Church; by reaſon thereby the right of Patronage ſeemeth to come in queſtion. but if they be both of one mans Patronage, they may be ſued there, to what value ſoeuer the thing demaunded ſhall amount vnto.*

[1] Goodall of the liberties of the Clergie by the lawes of the Realme.

That *Penſions* out of Churches, are demaundable (not onely by *ſtatute*, but alſo at the *common* lawe) in a court *eccleſiaſticall:* is made plaine, by [2] two *conſultations* in the *Regiſter*, and by other bookes of law. But *Goodall* further addeth: that *for a penſion, there lieth alſo a writte of Annuity at the common lawe; ſo that it is at the plaintifes election, where to ſue. but if there he doe declare, vpon the preſcription; and after he ſue in the ſpirituall court, by the name of a Penſion; the other (it ſeemeth) may then haue a prohibition.*

[2] Reg.pag.47.a. ibid.pag.53.a. Goodall, vbi ſupra.

For *Mortuaries*, that they at the *common* lawe be of *eccleſiaſticall* coniſance, reade the two *conſultations* in the *Regiſter*, and the other which [3] be here quoted. And likewiſe [4] for *oblations* detained; which ought (ſaith [5] *Goodall*) to be paid at their vſuall dayes.

[3] M.9.H.4. M.10 H.4.1. Entres, title of prohibition.

Another thing due to the *Miniſter*, whereby alſo he hath a part of maintenance, is demaundable and determinable in an *eccleſiaſticall* Court, viz. the *places of buriall*, and the *Churchyard*.

Reg.pag.45.b. Reg.pag.49.a.

[4] Reg. pag.50. a. b.

[5] Goodall, vbi ſupra.

Touching the firſt: *A Parſon, to an* [6] *aſſiſe brought againſt him for a houſe, did pleade that he was Parſon of P. and that to be parcell of his Church, by time immemoriall, and that there had bin burying of dead bodies:* whereupon *Perſey* held opinion, *that the court temporall, ought not to take conuſance thereof.* For the ſecond; [7] *it is a good plea againſt the iuriſdiction of the temporall court, to pleade, that the land is his Churchyard.*

[6] Li.44.aſſi.pa.8.

[7] 44.E.3.lib.aſſi.

The true reaſon hereof I take to be alledged by *Bracton* (becauſe it is dedicated and conſecrated to God) where thus he writeth: [8] *Negocium terminabitur in foro ſeculari, ſi de laico feodo agatur, niſi fuerit dedicatum & Deo ſacratum: ſic enim res efficietur ſacra: hoc autem dici non poteſt, de re in liberam & perpetuam eleemoſynam data.* For though a thing be giuen in *Francke almoigne*, to an *eccleſiaſticall* perſon; yet it remaineth of lay fee ſtill, and is not ſaid to be conſecrated to God. Therfore [9] *a treſpaſſe done vpon*

[8] Bra. li.5.ca.16.

[9] 19.H.6.20.

a Parſons glebe land (which is a francke tenement) cannot be tried in a ſpirituall court. But it ſeemeth that in a treſpaſſe done in a Churchyard, it is otherwiſe. for *if a* [1] *man take trees that are growing in a Churchyard, the Parſon may ſue for them in Court Chriſtian. Sed quare.*

[1] H.17.H.3. Fitz. referente, tit. prohib. 26.

And that matters of *buriall* doe belong to conuſance *eccleſiaſticall*, is declared by a *conſultation* in the [2] *Regiſter* very plainely.

[2] Reg. pag. 52.b.

CHAP. VII.

Of right to haue a Curate: and of contributions to reparations, and to other things required in Churches.

NOwe when a Pariſh or Hamlet hath right to haue a *Curate* found in their Chappell, to ſay them *diuine ſeruice:* If this be denied them, and no circumſtance otherwiſe be incident thereto, to drawe it to the *Common* lawe, it ſhould ſeeme by all reaſon (of his owne nature) to be a matter belonging to the conuſance of a court *eccleſiaſticall*, accordingly as alwayes (without impeachment) it hath bin vſed. Yet I finde in the bookes of *Common* lawe, that [3] *an action of the caſe was mainteinable for not ſaying diuine ſeruice, albeit it was there confeſſed, to be a ſpirituall matter.* What the circumſtances and cauſe thereof was, that it was ſo ruled in that caſe, *Quare.*

[3] 22.H.6.32.

It appeareth by the [4] *Regiſter*, that a *prohibition* being brought vpon a ſuite in court *eccleſiaſticall*, for withholding a *Chauntery*, a *conſultation* was after graunted: whereby is affirmed; that *pro ſubtractione Cantariæ, & debita punitione pro huiuſmodi ſubtractione*, the ſuite belongeth to a court *eccleſiaſticall:* and the like (therefore) muſt needes be thought of a *Chaplaine* or *Curate*, not found to ſay *diuine ſeruice*, where it ought to be either by *compoſition*, or by *preſcription.*

[4] Reg. pag. 56.a.

But that *pariſhioners* ought to be *contributories*, and may be cited in a cauſe of *contribution* towards the reparations of the body of the Church (termed *Nauis eccleſiæ*) and to the charges of buying and furniſhing other vtenſiles, ornaments, and bookes, required (by lawe) to be bought of the common charge; doth appeare partly by the *Regiſter*, and partly by *Fitzherbert* in his *noua*

natura

natura brevium, who doeth gather it thence. For *if* (ſaith he) *a* [1] *Biſhop doe cite any of the pariſhioners of a Church, to be contributorie to the reparations of the pariſh Church, or of any Chappell annexed to it: if the partie ſue a prohibition directed to the Biſhop, ſurmiſing that he is impleaded (touching lay fee) in court Chriſtian; the Biſhop ſhall haue a conſultation vpon this matter ſhewed in the Chancerie, on his behalfe.* And partly alſo by the *Iniunctions* which were ſet out by the *Queenes Maieſtie* in the firſt yeere of her reigne, and are vnder the great ſeale of *England*, for better record of the matter, her highneſſe being thereunto authoriſed by *acte of Parliament*. For in [2] theſe are conteined, ſundry vtenſiles, ornaments, bookes, and other things, that by the common coſt of euery Pariſh ſhall be prouided, and from time to time ſupplied: and whether they be wanting or no, is to be *enquired by eccleſiaſtical Iudges*; and the obſeruation of the *Iniunctions* is by them to be vrged (againſt thoſe, that ſhall infringe any of them) by *proceſſes* and cenſures *eccleſiaſticall*, according to the courſe of that lawe.

[1] Firzh. no. 88. br. tit. Conſult. fol. 50.

[2] Iniunctions publiſhed 1559.

And herein the *Iniunctions* followe but the *Cõmon* law. For [3] if a terre-tenant holding land that hath vſually paid for ſuch tenement a pound of waxe, or ſuch like, vnto the Church, doe withhold it; the Church-wardens may ſue him for it, in a court *eccleſ.*

[3] Of the liberties of the Clergie by the lawes of the Realme.

Alſo [4] if a man that withholdeth Church goods, doe by his laſt will enioyne his *executours* to make deliuerance; any of the Pariſh may ſue the *executours* for them in court *eccleſiaſticall*.

[4] Ibidem.

For proceeding *eccleſiaſtically* againſt refuſers to contribute vnto the reparations of the body of the Church, there remaineth a iudgement in a *conſultation* [5] (recorded in the *Regiſter*) to this effect, viz. *vobis ſignificamus, quod ſuper reparatione & emendatione defectuum corporis eccleſiæ (iuxta conſuetudinem approbatam) facienda: procedere poteritis, & ea facere, quæ ad forum eccleſiaſticum noueritis pertinere, dicta prohibitione non obſtante.* And by reaſon of defectes in reparations of a Church, money it ſelfe may lawfully be ſued for, in a court *eccleſiaſtical*, as [6] appeareth by another *conſultatiõ* in the *Regiſter*. And ſo is it alſo prouided by ſtatute (in this behalfe) amongſt other things, viz. [7] *Prelates may puniſh for leauing Churchyards vncloſed, or for that the Church is vncouered, or not conueniently decked: in which caſes, none other penance can be enioyned, but pecuniarie.*

[5] Reg. pag. 45. a.

[6] Reg. pag. 48. a.

[7] Circumſpectè agatis, 13. Ed. 1.

CHAP. VIII.

Proofes in generall, that ſundry crimes and offences are puniſhable by eccleſiaſticall Iuriſdiction: and namely, idolatrie, hereſie, periurie, or læſio fidei, and howe farre the laſt of theſe is there to be corrected: alſo of diſturbance of diuine ſeruice, or not frequenting of it, and neglect of the Sacraments.

LAſtly doe followe the teſtimonies of the lawes of the *Realme* for proofe, that many *crimes* alſo and *offences* are *puniſhable* by iuriſdiction *eccleſiaſticall:* and firſt in generall, then in particular, for ſundry of them: *The King* writ thus *to his Iudges:* [1] *vſe your ſelues circumſpectly in all matters concerning the Biſhop of Norwich & his Clergie, not puniſhing them, if they holde plea in court Chriſtian of ſuch things as be meerely ſpirituall, that is to wit, of penance enioyned for mortall ſinne, &c.*

[1] Statut. Circumſpectè agatis, 13. E. 1.

In hoſpitals [2] *that be of any others foundation then the Kings*, it is enacted that *Ordinaries ſhall enquire of the foundation, erection and gouernance of them, and of all other matters neceſſary in that behalfe: and thereupon make thereof correction and reformation after the lawes of holy Church, as to them belongeth.*

[2] 2. H. 5. ca. 1.

In the ſtatute of *Citation*, it is permitted, that a man may [3] be cited out of the *Diœces* where he dwelleth; *when ſome ſpirituall offence or cauſe is committed and done, or omitted, neglected, or foreſlowed to be done by ſome, hauing ſpirituall iuriſdiction.*

[3] 23. H. 8. ca. 9.

In a ſtatute of *K. Edward* the 6. [4] *Cauſes of correction* be reckoned as *eccleſiaſticall*: which ſtatute though it be repealed (for the principall purport thereof being touching *Ordinaries* ſeales, and names not to be vſed any more, in their citations and proceſſes) yet it bringeth ſufficient euidence, that ſundry *matters of correction* be of *eccleſiaſticall* iuriſdiction. And ſo *Bracton* teſtifieth, that it was vſed and holden in his time: for he ſaith, *In* [5] *cauſis ſpiritualibus vel ſpiritualitati annexis, vt ſi propeccato vel tranſgreſſione fuerit pœnitentia iniungenda, iudex eccleſiaſticus habet cognitionem, quia non pertinet ad regem iniungere pœnitentias, nec ad iudicem Secularem.*

[4] 1. Ed. 6. cap. 2.

[5] Bracton lib. 5. cap. 2.

The ſundry *conſultations* ſet downe in the *Regiſter* do ſhewe; that whē the proceeding is *ad correctionem animæ*, for ſome ſinne not

not puniſhable in the *Temporall* Court; the coniſance is *Eccleſiaſticall*. One [1] example ſhall ſuffice: viz. *Nolumus, cognitionem eccleſiaſticam, in ijs quæ ad forum eccleſiæ, & maximè ad correctionem animæ pertinent, contra iuſtitiam impedire.* [1] Regiſt. 45. a. b.

But to deſcend to more particulars, and firſt concerning thoſe which are contrary *Pietati in Deum*, That *idolatrie* is puniſhable by Iuriſdiction *eccleſiaſticall*; appeareth by the ſtatute [2] *De excommunicato capiendo*, afore alleaged: and touching *Hereſie* or *errour* in matter of Religion or doctrine (beſides that Statute) others doe alſo ſhew, how it is *inquirable*, and *puniſhable* by Iuriſdiction *eccleſiaſticall*. For both the Preamble and Statute of *Henrie* the fourth, and the Statute of *Henry* the fift touching *Hereſies*, doe plainely teſtifie hereof. In the former whereof is ſaid: [3] that *the Diœceſans of the Realme, cannot by their Iuriſdiction Spirituall, without ayde of the Royall Maieſtie, ſufficiently correct nor reſtreine the malice of Heretickes; becauſe they goe from Diœceſſe to Diœceſſe, and will not appeare before the Diœceſans, but contemne the keyes of the Church, and cenſures of the ſame, &c.* And in the [4] later: that *the coniuſance of Hereſie, errours and lollardies, belongeth to Iudges of holy Church, and not to ſecular Iudges.* And likewiſe by a later [5] Statute then thoſe, whereby it was prouided; that *euery perſon being preſented or indicted of any Hereſie, or duely accuſed or detected thereof by two lawfull witneſſes at the leaſt, to any Ordinaries, &c. might by them bee proceeded againſt, &c. and none otherwiſe.* [2] 5. Eliz. cap. 23. [3] 2. H. 4. ca. 15. [4] 2. H. 5. ca. 7. [5] 25. H. 8. c. 14

Neither is it materiall, though the ſaid three ſtatutes do ſtand repealed; for they ſhew (neuertheleſſe) touching *Hereſie*; what then was, and now is ſtill at the *Common* Lawe. which offence to be ſtill puniſhable at the *Common* Lawe, doeth alſo more plainely appeare by the ſtatute of *Citations*, being ſtil in force. For there it is prouided, that (the ſaid ſtatute notwithſtanding) [6] *the Archbiſhop may cite and ſummon any perſon of his prouince for cauſe of Hereſie, if the immediate Ordinarie doe conſent, or doe not his duetie: and that the prerogatiue of the Archbiſhop of Canterburie ſhall not be preiudiced by that Statute.* [6] 23 H. 8. c. 9.

The like is teſtified of *breach of an oathe*, and of *periurie* in an *eccleſiaſticall* Court or matter. For after that (amongſt diuers other matters) in the ſtatute of [7] *Circumſpecte agatis, breache of an othe* [7] *Circumſpecte agatis.* 13. Ed. 1.

othe is mentioned, it is thus in the ende added: *In all caſes afore rehearſed, the Spiritual Iudge ſhall haue power to take knowledge, notwithſtanding the kings prohibition.* And by the aforeſaide [1] Statute *De excommunicato capiendo* (among ſundry other crimes and offences) *Periurie in the Eccleſiaſticall Court*, is reckoned to be of *Eccleſiaſticall Iuriſdiction.* And ſo is it by a [2] prouiſo in the ſtatute againſt *periurie*, made at the ſame time.

[1] 5. Eliz. ca. 23.

[2] 5. Eliz. cap. 9.

By bookes of the *Common* Lawe, I finde two caſes, wherein *breach of othe* called *Laſio fidei*, in an othe voluntarily taken, whether priuately, or before an *Eccleſiaſticall Iudge* (as was in thoſe dayes much vſed) is to be determined in the *Temporall*, and not in the *Eccleſiaſticall Court.* The one is ſuch as fell out in the caſe of the vicar of *Saltaſh*; who had made an *Obligation*, and had bound it by an *othe* (that he would not goe againſt it) before the *Popes collector in England*; who pretended (though vniuſtly) ſome *Iuriſdiction Eccleſiaſticall* in himſelfe. Againſt which *othe*, when the *Vicar* was ſuppoſed to deale, and was therefore conuented before the ſaid *Collector*; there went foorth a *prohibition*, and no *conſultation* could be obteined. For (ſaid *Hankeford*) a [3] *man ſhall not be ſued before an Ordinarie for periurie, but where the principall matter whereupon the periurie grew, was a matter Spirituall or touching it:* and alledged this reaſon: *for elſe, if the periurie ſhould be found againſt him; hee ſhould be ſtraight awarded there, to performe the othe whereupon the periurie grewe, and whereof hee is attainted: and ſo (though it were to pay debts) he ſhould be there compelled to pay them; and hereby, Lay contracts ſhould be determined there, contrary to the Kings royaltie.*

[3] M. 2. H. 4. 15. Concordat 24. H. 1. per Brooke præmunire 16. Doct & ſtud. lib. 2. cap. 24.

And againe, the ſame man, in the [4] ſame Kings dayes, (afterward) reporteth; that *a man had ſworne to make a feofment of his land; and becauſe hee did it not, hee was vexed by the partie, in the Court Chriſtian, as for the periurie: and becauſe ſuch ſuite ſhall be as a compulſion to performe a thing touching land and inheritance; it was adiudged in ſuch maner, as if he had ſued for the principall, in Court Chriſtian.*

[4] T. 12. H. 4. fol. 241. ſecund. vnam impreſs. & 88. vel. 85. ſecund. aliam.

And the effect [5] of both theſe caſes is rehearſed (with the like reaſon) by *Forteſcue* in the Eſchequer Chamber; and was expreſſely graunted by ſome, and gainſaide by none. Therefore [6] *if a man and his wife doe aliene the right of his wife, and the wife*

[5] P. 38. H. 6. 29.

[6] Fitzh. tit. proh. 22. ex Regiſt.

wife is ſworne that ſhee will not ſue the Cui in vita: *and yet after the death of her huſband brings the Writte, and the other ſueth her in Court Chriſtian for breache of her othe, ſhee ſhall haue her prohibition.*

Agreeable to which, is that iudgement long agone, that [1] *if a man ſue another in Court Chriſtian* pro læſione fidei, *which othe aroſe vpon a temporall contract or cauſe, a prohibition lieth.* And [2] *Bracton* that writ in that time, ſaith thus: *In placito quod pertinet ad coronam & dignitatem regis, etſi fides fuerit appoſita in contractu, non propter hoc pertinebit cognitio ſuper principali ad indicium Eccleſiaſticum.* Hereof he alleged a reaſon in another place of the ſame booke, [3] *Iuriſdictionem regiam non mutat fidei interpoſitio, ſacramentum præſtitum, nec ſpontanea renuntiatio partium.*

[1] M. 4. H. 3. referente Fitzh. prohib. 15.
[2] Bracton lib. 5. cap. 2.
[3] Idem lib. 5. cap. 9.

To which reſolutions accordeth this booke caſe: *In an* [4] *attachment vpon a prohibition, where the plaintife was ſued in Court Chriſtian* pro læſione fidei, *in that hee had ſworne to pay fifteene pounds, and did not:* Brian *held, that when the faith is made touching a matter Spirituall, then the breach thereof ſhalbe puniſhed in a Court Spirituall:* (as if one ſhould ſweare to pay me his tithes truely, or a woman to marry with me) but *if the faith be made vpon a matter Temporall, then the breache of faith ſhall not be puniſhed there: becauſe they will not aſſoile him (if he be conuict) till ſome Temporall duetie be contented and payed.*

[4] M. 20. Ed. 4. fol. 10.

A later *Treatiſe* of the *Common* Lawe made in King *Henry* 8. his time, doth touche this [5] point thus, viz. *In moſt caſes of periurie, the King and his Courtes haue had the puniſhment, and in ſome caſes the Clergie in their Courtes, haue had the puniſhment, by the cuſtome of the Realme onely: viz. ſuch as haue riſen vpon Spirituall cauſes.*

[5] A Treatiſe that the B. of Rome had neuer Supremacie here, by the Lawes of the Realme. cap. 1.

Another caſe where the *Eccleſiaſtical* Law ſhall not haue conuſance of the breach of an *othe* voluntarily taken, is when there lieth an action for the matter (whereof the *othe* was confirmatorie) at the *Common* Lawe. therefore it was holden by *Brian* [6] not long after; that *if a man ſweare to pay twentie pounds, that he oweth, at a certaine time, and pay it not; and for the periurie be brought into the Spiritual Court, there ſhall lie a prohibition: becauſe* (ſaith he) *an action of debt lieth at the Common Lawe.*

[6] T. 22. Ed. 4. fol. 20.

I make this a ſeuerall cauſe and reaſon from the former, becauſe an

an othe may grow vpon a *Temporall* matter, (which was the former cauſe) and yet none action lie for it. And if I promiſe without any conſideration to giue you twentie pounds, and binde it with a voluntarie othe, it ſeemeth the *Common* Lawe will holde it ſtill but *pro nudo pacto*, and ſo giue none action at all.

But ſome occaſion is giuen vnto me to thinke, that courts *Eccleſiaſticall*, *de facto* (howſoeuer *de iure*) helde plea of breach of *othe* and of *faith falſified* (which[1] amounteth to aſmuch in ſome reſpects, as breach of a *corporall othe*) euen when ſuch othe or faith voluntarie taken, was for confirming of a matter *Temporall*. For this I finde not onely before the Writ was framed *de recognitionibus per ſacramenta non faciendis, de catallis & debitis, quæ non ſunt de teſtamento vel matrimonio*: but afterwarde alſo, and that aſwel by iudgement, as by opinions deliuered and reported for booke caſes: albeit with certaine cautions; which ſhall (by the way) be touched.

[1] *Lyndw. in cap. æternæ ſanctio. verbo fidei tranſgreſſione. de pœnis.*

Firſt then, that *Eccleſiaſtical* Courtes handled this cauſe long afore that Writte was deuiſed; I finde in a[2] *Prouinciall Conſtitution* made at a *Synode* holden at *Lambhith* vnder *Boniface* then *Archbiſhop* of *Canterburie*, in the time of King *Henrie* the third, *Anno Chriſti* 1260. which conſtitution I doe alleadge, not as being of force now, for the purport thereof (becauſe it aimeth at the bridling of the Kings Prerogatiue, and of his *Temporall* Courtes) but thereby (hiſtorically) to ſhewe, what was then held and practiſed vſually.

[2] *Prou. Conſtitutio, æternæ ſanctio. de pœnis.*

The effect of it (to this purpoſe) is: that whereas *Prelats* doe take Coniſance of ſinnes and of miſdemeanours of ſuch as be vnder their *Iuriſdiction*; as of *Periurie*, or *breache of faith*, of *Sacrileage*, of *violation of Church liberties*, (for infringing of which, euen by the *Kings Charter* graunted to the Church of *England*, ſuch diſturbers doe fall into Excommunication *ipſo facto*) and of ſuch like cauſes which be meerely of *Eccleſiaſtical* Coniſance: yet are *prohibitions* directed foorth out of the *Kings* Court; and Iudges *Eccleſiaſticall* are called thither to anſwere; as if they delt not concerning *Periurie and breach of faith*; but ſuggeſting that they deale touching *chattels*. Therefore a little after, is added this, viz.[3] *And if perhaps the King in his attachements, prohibitions, and ſummons ſhall make mention, not of Tithes, but of right*

[3] Dicta. Prou. Conſt.

right of Patronage: not of faith falſified or periury, but of Chattelles: not of ſacrilege or diſturbance of eccleſiaſticall liberties, but of ſome treſpaſſe pretended to be done by his ſubiects or bailiffes, the redreſſe whereof belongeth vnto him: then let the Prelates aforeſaid make knowen vnto him; that they holde no plea, neither intend to do, concerning right of Patronage, or chattelles, or any other things belonging to his court: but concerning tithes, ſinnes, and other meere ſpirituall matters, belonging to their office and iuriſdiction, and touching the ſafety of mens ſoules &c. So that the trueth of ſuch allegation being manifeſted to the king, they thought the plea ſound and ſufficient, to obteinea diſcharge from ſuch *prohibitions*, &c. if they were in thoſe reſpects onely granted.

Yea, and *Lindwood*, who writ *anno 1423*, and long after that writ was framed (who alſo by reaſon he was *Officiall principall* of *Canterbury* or *Deane of the Arches*, had good experience in theſe cauſes) maketh no [1] doubt; but that matter of *periury* or of *breach of faith*, ariſing vpon what cauſe ſoeuer, ſo farre foorth as it concerneth doubt, whether ſuch *oath* were lawfull or not, and doe binde in conſcience, or not; is of eccleſiaſticall coniſance. And therefore teacheth how the libell in that caſe is to be framed, that no cauſe of *prohibition* be giuen, *viz. the partie hath damnably broken his oath made for payment of ſo much money, vnlawfully pretending, that hee is not thereby bound or tied.* The ſtatute *Circumſpecte agatis* ſaith: *defamation ſhalbe tried in a Spirituall court when money is not demanded, but a thing done for puniſhment of the ſinne, and likewiſe for breaking an oath*; without diſtinction, whether it aroſe of a temporall cauſe or not.

[1] Lindw. ibidem V. periurio.

Since the ſaid writ, we haue a iudgement in the very point in the time [2] of king *Edward* the third. *For if a man demand a debt of tenne pounds before the Ordinarie, for that the defendant plight his faith to pay it &c. and hath not payd it, but broken his faith: the Ordinarie cannot enioyne him to pay the debt for ſauegard of his faith; and if he do, he doth it againſt the kings prohibition. But he ought to enioyne him other corporall penance, except the partie will willingly redeeme it.* For ſo *Fitzherbert* [3] readeth thoſe laſt wordes of exception, more truely then my booke of *Aſſiſes* (as it is printed) carying indeed therein no ſenſe at all. The like appeareth in the reigne of king *Henrie* the ſixt: for there it [4] was holden, that *if a man*

[2] Lib. 22. Aſſiſ fol. 70.

[3] Fitzherberts Abridgement tit. Prohibition, num. 2.

[4] 34. H. 6. 70. vt Brooke allegat tit. Iuriſdiction num 2.

man buy an horſe of me, and ſweare vpon the Euangeliſts to pay me ten pounds for him ſuch a day, and pay it not: I ſhall haue action of debt at the Common law, and alſo a citation pro læſione fidei *at the Spirituall law, and ſhall not therein offend the Common law, becauſe they are diuers things.*

As for opinions afterward, we finde it was held by *Brian* and *Litleton* in the time of K. *Edward* the fourth, none there gainſaying it: that [1] *in læſione fidei ariſing vpon a temporall matter, the Spirituall court might puniſh it* ex officio, *but not at the ſuite of the party.*

[1] M. 20. Ed. 4. fo. 10.

To the ſame purpoſe alſo *Mordant* ſaid in the time of K. *Henrie* the ſeuenth, [2] that *if a man be ſued in a Court eccleſiaſticall by a party* pro læſione fidei, *in not paying a ſumme of money promiſed, there ſhall lie a prohibition; but if the Iudge eccleſiaſticall ſhall do it* ex officio, *then no prohibition ſhall lie.* which no man gainſaid or impugned. Theſe two opinions, leſt they ſhould ſeeme to croſſe the former iudgement in the booke of *aſſiſes*, and the other booke caſe of *34. H. 6.* (both which admit a party to ſue in the Court eccleſiaſticall) do ſeeme to me only therefore to reiect a *partie*, and to require proceeding *ex officio Iudicis*: becauſe it was preſumed; that a party would not proſecute, to haue the ſinne alone puniſhed; but rather for ſatisfaction of the thing promiſed to him. Yet this in truth may be otherwiſe by the *law eccleſiaſticall*. So that vpon all that which hath herein bin laſt ſpoken, it might probably ſeeme to ſome; that puniſhment of *periury* or *breach of faith*, euen ariſing vpon a *temporall* cauſe, ſhould be ſtill (by the Common law) of *eccleſiaſticall coniſance:* ſo that penance for the *ſinne* be but enioyned, and no *temporall amends* required. which doubt is to be referred to the reuerend Iudges reſolutions.

[2] T. 12. H. 7. fol. 22.

That *diſturbance of diuine ſeruice* is alſo puniſhable by *iuriſdiction eccleſiaſticall*, the ſtatute thereof made, in the time [3] of *Q. Marie*, doth prooue: for though it do prouide puniſhment temporall therefore; yet it reſerueth the *iuriſdiction* that *Ordinaries* had, for puniſhment thereof by lawes *eccleſiaſticall*. Not to frequent or come to *diuine ſeruice* at times appointed, is declared to be ſubiect to proceeding and cenſures eccleſiaſticall, aſwell as to other puniſhments, by the ſtatute [4] for *Vniformitie of Common prayer:* and ſo is both that, and neglect of the *Sacraments*; by the ſtatute *De excommunicato capiendo*, heeretofore often alleged

[3] 1. Mar. cap. 3.

[4] 1. Eliz. cap. 2.

alleged, prooued to be of *Eccleſiaſticall conuſance.*

Long afore that ſtatute, vpon a *prohibition* brought, a *conſultation*[1] was granted: whereby the *Ordinaries* proceeding *ex officio*, againſt one that refuſed to *receiue the Communion*, is allowed and warranted. And ſo doth the litle[2] *Treatiſe* of *the liberties of the Clergie*, report this offence to be of *Eccleſiaſticall conuſance.* Thus much touching offences eccleſiaſticall, being referred to *impietie* towards God.

[1] Reg pag. 50. a.b.

[2] Goodall of the liberties of the Clergie.

CHAP. IX.

That ſimony, vſury, defamation or ſlander, beating of a Clerke, ſacrilege, brauling or fighting in Church or Churchyard, dilapidations, or waſte of an Eccleſiaſticall liuing, and all incontinencie, are puniſhable by Eccleſiaſticall authority, and how farre.

AMongſt ſuch crimes as be offences againſt *iuſtice*, I do place *ſimony* firſt; as participating alſo not a litle with the former ſort, yet rightly ſorted hither: becauſe it is, as a buying and ſelling of ſuch things, as be not (in trueth) *res mancipi* (as the olde *Romanes* ſpake) things lying not in commerce betweene men to be bought and ſolde. This fault the ſaid[3] ſtatute *De excommunicato capiendo*, ſheweth to be puniſhable by *iuriſdiction eccleſiaſticall.*

[3] Ibid. in fine.

That *vſurie* is likewiſe, it doth appeare by authoritie of diuers Parliaments. *The king and his*[4] *ſhall haue the conuſance of the vſurers dead, and the Ordinaries of holy church ſhall haue the conuſance of vſurers on liue, as to them apperteineth, to make compulſion by the cenſures of holy church for the ſinne, and to make reſtitution of the vſuries taken, againſt the lawes of holy church.*

[4] 15. E. 3. cap. 5.

By annother later act made againſt vſurie, [5] there are *reſerued to the ſpiritnall iuriſdiction, their lawfull puniſhments in euery cauſe of vſury.* And ſo is it expreſly alſo mentioned in the aforenamed ſtatute *De excommunicato capiendo*: but this iuriſdiction is ſince ſomewhat reſtreined, becauſe[6] *vſurie* can not now therby be puniſhed nor corrected, except it reach aboue the rate of tenne in the hundred by yere.

[5] 11. H. 7. cap 8.

[6] 13 Eliz. cap. 8.

By a *conſultation* in the[7] *Regiſter*, which was granted in allowance of proceeding againſt one for his *vſury*, it is thus ſayd, in

[7] Reg. pag 49. b.

this behalfe: *Quia in articulis Cleri continetur, quòd si Prælati imponant alicui pœnitentiam pro peccato, prohibitioni noſtræ non eſt locus, vobis ſignificamus quòd ad correctionem animæ præfati S. in hac parte* (viz. pro vſura) *dum tamen nihil aliud attentetis quod cedat in læſionem dignitatis noſtræ, in curia Chriſtianitatis procedere poteritis, prohibitione noſtra non obſtante.* But this fault & ſinne of *Vſurie* is *mixti fori*: that is to ſay, in ſome reſpect is of *temporall*, & in other regard of *eccleſiaſticall coniſance*, not only by the ſtatutes of the Realme (as you haue heard) but alſo euen by the law *ciuill*, albeit in a diuers ſort. For in countreyes where that law hath place, if it be [1] called in queſtion, whether a contract be vſurarious or not, the court *eccleſiaſticall* doth determine this: but for to pronounce ſuch a contract void and to execute that ſentence, belongeth to a *temporall* court.

[1] D D. in l. Titia. ff. ſoluto matrimonio.

For cauſe of *defamation*, it is [2] recorded by an olde ſtatute, that *it is alreadie granted, it ſhall be tried in a Spirituall court.* And againe: *In* [3] *defamation, prelates ſhall correct by penance corporall, the kings prohibition notwithſtanding: but if the offender will redeeme the penance with money, the prelate may freely receiue the money, though the kings prohibition be ſhewed.*

[2] Stat. circumſpectis. 13. Ed. 1.

[3] Artic. cleri 9. Ed. 2. cap. 4.

By the preamble alſo of the ſtatute for [4] *citations*, it is plainely argued, that *defamations* belong to the coniſance of *iuriſdiction eccleſiaſticall*, ſo they be duely and according to law proſecuted. Alſo by the bookes of Common law it appeareth throughout the arguments made in the great caſe of *prohibition*, in the time of [5] *Henry* the ſeuenth, that the ſuite for *defamation* belongeth to *eccleſiaſticall iuriſdiction*. for there, aſwell by thoſe *Sergeants* that ſtood againſt the *conſultation*, as the others, and by the *Iudges* alſo that granted the *conſultation* (the originall cauſe being *defamation*) it is yeelded, that *the puniſhment of ſlander or defamation, is belonging to the Spirituall law.*

[4] 23. H. 8. cap. 9.

[5] T. 12. H. 7. fol. 12.

Whereas there is a *Prouinciall conſtitution*, that decreeth a ſlanderer or defamer of another, to be *ipſo facto* excommunicate, this is allowed by [6] *conſultation* in the *Regiſter*, vnto a court *eccleſiaſticall*. And it is there added to this effect, *viz. Si in cauſa diffamationis ad pœnam canonicam imponendam agatur, tunc vlterius licitè facere poteritis, quod ad forum eccleſiæ noueritis pertinere, prohibitione noſtra non obſtante.*

[6] Reg. pag. 49. a

One

One that ſued [1] another in a cauſe of *diffamation* in court *eccleſiaſticall*, was there condemned in expenſes to the defendant, who was abſolued, for that the plaintife failed in his proofes. The plaintife to hinder the execution of the ſentence, and to eſcape without expenſes, procured a *prohibition*. Yet vpon debating of the matter; a *Conſultation* was herein alſo awarded. So that wee ſee, both the *Principall* and the *Acceſſarie* cauſe, to be of *eccleſiaſticall* coniſance.

[1] Reg. pag. 51. a.

If (ſaieth [2] the *Treatiſe of the Liberties of the Clergie*) *a man defame or publiſh one for falſe, an adulterer or vſurer, he may be ſued in court eccleſiaſticall.* And another *Treatiſe* (publiſhed alſo in king *Henry* the 8. time by a common Lawyer) ſaieth thus: [3] *In ſome caſes of diffamation and ſlander, the kings courts; and in ſome caſes the Clergie haue holden plea thereof.*

[2] Liberties of the Clergie, by the lawes of the Realme.

[3] That the biſhop of Rome, &c. cap. 3. printed by Berthelet.

Therefore I doe the more maruell (the lawe being ſo plaine) at the *Note* that is ſet [4] downe in the *Regiſter* touching this matter, viz. *All the Iuſtices are againſt a Conſultation in a caſe of diffamation.* which is ſpoken indiſtinctly and indefinitely, and therefore more generally perhaps touching any *diffamation* what ſo euer, then the *Iuſtices* meant, or then by *Statutes* and *lawe* may be warranted.

[4] Note in Reg. pag. 54. b.

It may be that a booke caſe of *Henry* the 4. gaue occaſion of this miſtaking, being not throughly weied. for at firſt ſight it ſeemeth to ſound, as if no diffamation at all were of *eccleſiaſticall coniſance*. And ſo [5] euen *Brooke* in his *Abridgement* ſeemeth to take it. But the trueth is, by that caſe is onely meant, that ſuch *diffamation* as ariſeth vpon a *Temporall* matter, is not of *eccleſiaſticall* coniſance: which is the firſt exception of the generall rule ſet downe in the Statute of *Circumſpectè agatis*: where is ſayd; that *diffamation ſhalbe tried in the Spirituall court.*

[5] Tit. Conſultation, nu. 2. & alibi.

And that the ſaid caſe is to be reſtrained to ſuch *diffamation* onely, will appeare moſt plainlie to him, that conſidereth the ſcope of [6] *Hankefords* argument. The *Vicar* of *Saltaſhe* had giuen an othe before the *Popes Collecter*, in confirmation of an obligation by him made. The Deane of *Windſor* ſued the Vicar before the *Collecter*, *pro leſione fidei:* the Vicar purchaſed a prohibition. *Hankeford* to maintaine this *prohibition*, argueth, that *the periurie could not bee ſued in an eccleſiaſticall court, for that it aroſe*

[6] M. 2. H. 4. fol. 15.

vpon a temporall cauſe. Adding for proofe of his ſaying, that *himſelfe had a matter vpon the like reaſon ruled for him, and againſt the Archbiſhop of Canterbury, H. 14. Edw. 3. par attachment ſur Prohibition, &c. de ceo que il ſuiſt en court Chriſtian, pur diffamation.* The matter then was not ruled againſt the *Archbiſhop* ſimply, for ſuing *diffamation* there; but of ſuch a kinde of *diffamation*. For elſe this would not haue fitted the purpoſe of *Hankefords* argument: becauſe hee hauing to prooue that *læſio fidei* ariſing vpon a *Temporall* cauſe might not bee ſued in an *eccleſiaſticall court*: could not make any colour of that aſſertion, by alleaging of a iudgement that no *diffamation* at all might bee proſecuted there: for that is not the like reaſon. And therefore, as that *læſio fidei* aroſe on a *Temporall* cauſe; ſo did the *diffamation* there ſpoken of, for which a *prohibition* did lie without *Conſultation.*

That *diffamatorie* words touching a *temporall* cauſe may not be ſued in court *eccleſiaſticall*; we haue alſo a prohibition [1] in the *Regiſter*, without any *Conſultation* granted. For whereas one gaue witneſſe in an *Inquiſition* made by the king about his exchange in *Yorke*: the partie touched, ſued the witneſſe (for diffaming him) in a court *eccleſiaſticall*, whereupon the witneſſe brought a *Prohibition*, by reaſon the matter was a *Temporall* cauſe.

[1] Regiſt. fol. 42. b

By Statute likewiſe it is [2] enacted, that *a Prohibition ſhall lie, if a man be ſued in court eccleſiaſticall for diffamation, in that hee endited the other.*

[2] Ed. 3. c. 11.

I finde alſo another cauſe, why ſome *diffamation* may not be ſued in a court Eccleſiaſticall: and that is, when action therefore lieth at the *Common* lawe. As [3] where *a man brought Action of treſpaſſe for goods taken away; the defendant hereupon ſued him in a ſpirituall Court for diffamation. But* Huſſey *the kings Atturney, in behalfe of the Plaintife deſired a Prohibition; becauſe the plea in Court Chriſtian was mooued, the ſuite hanging there: and had it graunted.* Quod nota. *So if I be robbed, and ſpeake of him that robbed mee before others, ſo that hee ſueth mee in a ſpirituall court for diffamation, there lieth a Prohibition: becauſe I*

[3] P. 18. Ed. 4. fol. 6.

may

may haue an Action at the Common lawe, videlicet, *mine appeale of the robberie.*

There be alſo in the booke of[1] *Entries*, precedents of *Prohibitions* granted agaynſt thoſe that for *diffamation* proſecuted ſuch in court *eccleſiaſticall*, as ſued them in *temporall* courtes, for maime, and for forging of euidences.

[1] Booke of Entries, tit. Prohibition.

So that wee may conclude this point, that out of the caſes excepted; the rule of *Circumſpectè agatis*, and *Articuli Cleri* (for *diffamation* to bee of eccleſiaſticall coniſance) hath place, euen by allowance of the common lawe.

There reſteth yet one point belonging to this place; fit to be cleared. There is alleaged for other purpoſes by the *Note-gatherer*, a little olde printed *Treatiſe, Concerning the power of the Clergie, and lawes of the Realme*. In which, the Statute of *Circumſpectè agatis* (both here and elſewhere by me alleaged) is auouched to bee *no Statute*, but *a bare conſtitution*. The words[2] bee theſe: *Wee neuer ſawe any proofe that Circumſpectè agatis, was a Statute, or taken out of the kings anſweres. and there bee in the ſayd treatiſe diuers things that bee directlie agaynſt the lawes of the Realme, as it is in this point. That Prelates for fornication, auouterie and ſuch other, may ſometime aſſigne bodilie paine, and ſometime pecuniarie payne. And the lawe is, that Prelates ſhall neuer aſſigne pecuniarie payne for correction of ſinne, but onely at the deſire of the partie. And alſo it is recited in the ſayd Treatiſe, that if the Prelate of any Church, or his Aduocate, aske of the perſon a penſion; that the ſuite ſhould bee in the Spirituall Courte: and the lawe of the Realme is euen to the contrarie. And we thinke, that if it had bene a Statute; that the lawe ſhould neuer haue bene vſed therein, ſo directlie agaynſt the Statute, as it hath bene vſed. And in the nineteenth yeere of King* Edward *the third, in a Writte of Annuitie brought in the Kings Court againſt the ſayd Article of the ſayd Treatiſe: it is ſayd, that the ſayd Treatiſe is no Statute, but named ſo to bee by the Prelates. And alſo the ſayde Writte of Annuitie is iudged to bee maintenable in the Kings Courte, and that is directlie agaynſt the Treatiſe of Circumſpectè agatis, wherefore wee thinke it is no Statute.*

[2] Of the power of the Clergie and lawes of the realme, cap. 8.

The

The verie like wordes are alſo vſed (I thinke all by one Author) in [1] another *Treatiſe of conſtitutions Prouinciall and Legatine.*

[1] Ibid. cap. 8.

Nowe, in that to prooue it no *Statute*, he ſaieth; *There bee in it diuers things directly againſt the lawes of the realme*, ſeemeth to me a ſtrange reaſon. As though ſtatutes (for the moſt part) bee not to the reſtraining and changing of the lawe of the realme.

His firſt ſpeciall obiection doeth anſwere it ſelfe. For if the *Partie* deſire commutation of *corporall* penance into *pecuniarie*, eſpecially if he be a free man; the *Ordinarie* may lawfully accept of that *commutation*, and being ſo vnderſtood, *circumſpectè agatis*; iumpeth therein both with [2] lawe and practiſe.

[2] Articuli Cleri 9. Ed. 2. cap. 2, 3. & 4.

Touching his ſecond obiection againſt it, of a *penſion:* I referre my ſelfe to that which hereof hath bene ſpoken in the 6. Chapter of this firſt part. As concerning his alleaged booke of 19. *Edward* the 3. reporting it to be no *Statute*, I muſt tell him, that hee hath a larger printed booke then mine; if hee haue any reports, either of the 19. or 20. yeeres of king *Edw. 3.*

But whatſoeuer either he that was Author of thoſe two little *Treatiſes*, or any other priuate or particular perſons doe thinke may be collected or probablie ſpoken thereof: I truſt they will all be contented to ſubmit their iudgements to an *Acte of Parliament.* Therefore to cut of all doubts at once in this behalfe; let them read the [3] *Acte for true paiment of tithes*, made in king *Edward* the 6. time; where both *Articuli Cleri*, *Sylua caedua*, *de regia prohibitione*, and alſo *Circumſpectè agatis* bee called *Statutes*, and are appointed to remaine in their entire, as they were afore that new ſtatute.

[3] 1. & 2. Ed. 6. cap. 13. in a Proviſo.

If a man lay [4] *violent hands on a Prieſt*, this offence is puniſhable alſo by *eccleſiaſticall Iudges.* Therefore it was determined in another Parliament, that *for excommunication* pro violenta manuum iniectione in Clericum, *before* [5] *a Prelate, where penance corporall is enioyned: if the defendant will redeeme his penance by giuing money to the Prelate or partie grieued, it ſhall be required before the Prelate, and the kings prohibition ſhall not lie.*

[4] Stat. circumſ. agatis, 13. Ed. 1.

[5] Art. Cleri. 9. Ed. 2. ca. 3.

This ſeemeth to haue bene there determinable (by ſome reports at the *Common* law) euen afore theſe ſtatutes. [6] For *if a man enter into S. Iohns place, and beate the brethren there, and take their chattels, for this violence he ſhall be ſued in Court Chriſtian, and ſo*

[6] H. 7. H. 3. referente Fitzh. tit. Prohibition, nu. 30.

it

it was adiudged by the Court.

In a *Conſultation* granted after a *prohibition* in this caſe was brought, it is [1] thus cõteined in the *Regiſter*, viz. *ſi in cauſa iniectionis manuum violentarum in clericum, in poſſeſſione Clericatus exiſtentem, quémq; alter ſcinit eſſe clericum, non de violata pace noſtra, ſed de excommunicatione, ad correctionem animæ tantummodo agatur: tunc prohibitione noſtra non obſtante, vlteriùs in eadem facere poteritis, quod ſecundum forum eccleſiæ, & de iure fore videritis faciendum.*

[1] Reg. fol. 49. b.

But I find two caſes where laying violent hands on a Clerke, ſhall not bee ſued in a Court Eccleſiaſticall, but there will lie a prohibition. The firſt is, *If a Clerke be* [2] *arreſted at the Common law, if thereupon he ſue in a ſpirituall Court* pro violenta manuum iniectione in Clericum, *there lieth Prohibition.* Another caſe is, [3] *when a man is excommunicate for laying violent hands on a Clerke, if the ſpirituall Court denie abſolution till amends bee made to the partie for the batterie, a prohibition alſo will be granted: becauſe it ſhall be entended, he which ſueth, doeth it to recouer damages.*

[2] Regiſt. fol. 42. & 51.

[3] T. 11. H. 4. fol. 241. in aliis libris vel 88. vel 85.

But (though it be at the ſuite of the partie) if onely the *puniſhment* of the offence, and not any *amends* be ſued for, it is determinable in a *Court eccleſiaſticall*, albeit the [4] *Temporall* Court haue alſo the debating of the matter, touching the amends and the batterie. For (ſaieth *Thirning*) *if a partie ſue onely* [5] *to enforme the Court that the other hath laid violent handes vpon him, being a Clerke; to the intent, the ſentence of holy Church may goe againſt him, to be excomunicate for the wrong done to holy Church, and not to recouer dammages; peraduenture it might be tollerable.* To which an other booke agreeth, [6] that *if a man beate a Clerke, and he ſue him in the ſpirituall Court for his ſinne of excommunication, he doeth well: but if be ſue to haue the matter there examined, & for amends; there lieth a prohibition.* For we finde a [7] precedent of a *Conſultation* granted, euen where a partie ſued in *Court Chriſtian, pro violenta manuum iniectione in Clericum.*

[4] Art. Cleri. 3. & 6.

[5] Ibidem.

[6] H. 22. Ed. 4. fol.

[7] Entrees. tit. Prohibition.

And ſo is it teſtified by the [8] booke *of the Liberties of the Clergie, by the lawes of the Realme*, in theſe words: *A Prieſt may ſue to haue him excommunicated or corporallie puniſhed that laid violent hands vpon him, but not to haue amends.* Neuertheleſſe, *if* [9] *a man put to corporall penance for diffamation, or for beating a Clerke,*

[8] Gooddall of the Liberties of the Clergie.

[9] Gooddall ibid.

to redeeme his penance, wil agree to pay mony to the partie damnified: & after contrary to his promise will not pay it; he may then be sued by the partie damnified, euen for the mony, in a court ecclesiasticall. And not onely the partie may thus sue to haue him punished, but the

1 M.20.Ed.4.10 [1] Spiritual court may also punish it *ex officio*, as *Brian* and *Litleton* there did hold.

To this accordeth the said litle booke, where is sayd, that *the*

2 Gooddall, ibid. [2] *ecclesiasticall Iudge may of Office cite for laying violent hands on a Clerke, to punish him corporally, but not by money.* Whose opinion is well confirmed by a *Consultation* in the *Register*, to that purpose.

3 Reg.fol.51.a. For thence is [3] gathered, both that such a *beater of a Clerke*, doeth incurre *excommunication ipso facto:* and that the *ecclesiasticall* Iudge *ex Officio*, may lawfully proceed to enioyne him *corporall* punishment.

Touching Sacrilege, that it is also punishable by lawe in a Court *ecclesiasticall*, two adiudged cases may bee alleaged out

4 M.4.H.3.per Fitz.Prohib. nu.14. [4] of *Fitzherberts* great Abridgement. For *if a man take goods out of the Church or Churchyard, hee that hath propertie, may sue him in a Court Christian, and may compell him to stand to the sentence and iudgement of the Spirituall court for this offence.* And

5 H.17.H.3. per Fitzh.tit, Prohib. nu.26. againe: [5] *If a man take trees that are growing in the Churchyard, the Parson may sue for them in court Christian, and for the sacrilege also.*

6 Lyndw.in V. Sacrilegio. c.æternæ sanctio. de pœnis. *Lyndwood*, speaking of *Sacrilege*, [6] saieth, *It is not a crime meerelie ecclesiasticall: because the conisance thereof may belong to a temporall Iudge, at least touching the corporall penaltie: but not concerning the censures of the Church, that ought to bee laied vpon such.*

7 5.& 6.Ed.6. cap.4. [7] Concerning fighting, quarelling, and brawling in *Church* or *Churchyard*, the *Ordinarie* in some degree is to punish it by suspension *ab ingressu ecclesiæ* in a laie man, and from ministration in his office in a Clerke; and in another degree, in either sorte *Laie* or *Ecclesiasticall*, by denouncing the partie offending to bee *excommunicate ipso facto*, by vertue of that Statute.

Dilapidations likewise, & waste made vpō a liuing *Ecclesiasti-*

8 13.Eliz.ca.10. *call*, are determinable & [8] punishable by *Ordinaries*. For the Statute made in her Maiesties time for remedy in *Dilapidations* prouideth;

uideth; that as afore by the lawes *Eccleſiaſticall*, iuſt actions and remedies might bee had againſt executors and adminiſtrators of deceaſed incumbents: ſo they ſhould by vertue thereof bee vſed againſt alienees and donees of the goods of ſuch incumbents.

The Treatiſe of the *Clergies* liberties ſaieth, that *for* [1] *Dilapidation the parſon may ſue (in courte Eccleſiaſticall) the executors of his predeceſſor.* [1] Liberties of the Clergie by the lawes of the Realme.

So at the [2] Common lawe, *Tirwhit* did hold, that *if an eccleſiaſticall perſon make waſte of his benefice, he ſhal be depoſed, as a Dilapidator of his Church.* But depoſition cannot be iuſtified, but by authoritie *eccleſiaſticall.* [2] M.2.H.4.fol.9.

Thoſe crimes which I ſayd were oppoſite to ſobrietie in a mans owne ſelfe, are alſo puniſhable by *eccleſiaſticall* authoritie. [3] *For the Clergie are not to be puniſhed for holding plea in court Chriſtian, of ſuch things as bee meerelie ſpirituall, that is to wit, of penance enioyned for deadlie ſinne, as fornication, adulterie, and ſuch like.* In which words of (ſuch like) I doubt not but other *incontinencies*, as *Inceſt*, *Stuprum*, and *Polygamie* be alſo vnderſtood, being all more grieuous then fornication, and two of them more execrable then adulterie. [3] Stat. Circumſpectè agatis. 13.Ed.1.

And ſo doeth *Lyndwood* interprete the word, *huiuſmodi*, *ſuch like: that* [4] *is to ſay* (ſaieth hee) *Inceſt, whoredome, and others, which be contained vnder the ſinne of Lecherie. And to theſe are to bee added other crimes, which alſo are to bee handled and puniſhed in a court eccleſiaſticall; as namelie, Sacrilege, Vſurie, Hereſie, Simonie, and Periurie, to* [5] *which an old Canon alſo addeth ſuch offenders as be* Inſpectatores nugarum, *and conſulters of Starregazers, Phanaticall perſons, Wiſardes, Fortune-tellers, Drunkards, and Idolaters.* [4] Lyndw.V. huiuſmodi, c. Circumſpectè. de foro competenti. [5] c. Ecce. 23.q.4.

And to make it more plaine, that all vnlawfull companie of man and woman, not being capitall by the lawes of the *Realme*, is ſubiect to the *Iuriſdiction eccleſiaſticall*, the [6] generall worde of *Incontinencie* (which comprehendeth all) is vſed in the ſtatute *De excommunicato capiendo.* [6] 5.Eliz.ca.23.

In the [7] *Regiſter* there bee two precedents of *Conſultations* granted in cauſes of *Fornication*; againſt which (in both) the Iudge alſo proceeded *of office*. And the treatiſe of *Clergie liberties* [7] Reg.fol.45.a. & 57.b.

saieth, [1] *Though a bishop may not visite the Kings free Chappell, yet he may cite and punish the Chaplaine thereof for keeping a concubine.* Heare also what another olde Treatise written by a common Lawyer, in those times [2] saieth in this behalfe, viz. *the Clergie ought to haue correction (as of crimes meere spirituall) of auoutrie, fornication, Simonie, and Vsurie, and to order matrimonie, tithes, oblations, and periurie (in some case) and of diuers other things: whereof it is no doubt, but they haue holden plea in times past, rather by a custome and by sufferance of princes; then for that they be meere spirituall, or that they had authoritie by the immediate power of God.* So that they bee by him yeelded, of long time to haue bene of *ecclesiasticall* conisance.

[1] Gooddall of Clergie Liberties.

[2] An answere to a letter, cap. 1. Printed by Tho. Godfrey, tempore H.8.

CHAP. X.

That the matters and crimes here reckoned bee also of ecclesiasticall Iurisdiction: and proofes, that any subiect laie or other, may be cited in any cause ecclesiasticall.

THere doe yet remaine sundrie points, which in the second Chapter of this part, I haue set out, as being of *ecclesiasticall* conisance, hitherto not spoken vnto purposelie. First then for *ordaining of reall compositions* (being a matter of *voluntarie iurisdiction*) and *disanulling* of them, if they haue bene made contrarie to lawe and right (which is for the most part of *Iurisdiction contentious*) we haue in the *Register* some testimonie. For [3] whereas an *Ordinarie* had made *an ordination* or *reall composition* for certaine *Chaplains* to serue from time to time in a Church, which were not found by those that ought; the bishop hereupon *ex officio* proceeded to *interdict* the Church, and vnto other *Canonicall* paines. And though thereupon a *Prohibition* was brought, yet was it reuersed (vpon debating) by *consultation*, and the bishops proceeding allowed, for lawfull.

[3] Reg. fol. 51. b.

Touching [4] *disanulling* of a *reall composition* (vnduely made) in a *Consultation* there, is thus conteined: *Significamus quod in negotio adnullationis Ordinationis pro Pensione, tanquam iniqua &*

[4] Reg. fol. 50. a.

& non rationabiliter facta, & non de laico feodo in curia Chriſtianitatis agitur, procedere, & vlteriùs facere poteritis, &c. prohibitione noſtra non obſtante.

Next follow the cenſures eccleſiaſticall, whereby *Ordinaries* puniſh or vrge execution of their ſentences or decrees. Firſt *ſuſpenſion ab ingreſſu eccleſiæ*, is [1] ſhewed to be an eccleſiaſticall cenſure by a ſtatute of king *Edward* the ſixt, forbidding brauling in *Church* or *Church-yard*. The other *ſuſpenſion* indiſtinctly taken, whether *ab officio tantùm*, or *ab officio & beneficio*; is mentioned for a *cenſure eccleſiaſticall*, by [2] a ſtatute *1. El.* and by her [3] Highneſſe *Iniunctions*.

[1] 5. & 6. Edw. 6. cap. 4.

[2] 1. Eliz. cap. 2.
[3] Iniunctiones in fine.

Interdiction of a Church is alſo prooued ſo to be, by the firſt allegation out of the *Regiſter* in this chapter.

That *Sequeſtration* is another cenſure eccleſiaſticall, and the coniſance of the violation thereof of that iuriſdiction, is prooued cleerely by a conſultation in the Regiſter. For there a certeine Pariſhioner [4] had cut downe *Syluam caduam*, not paying but deteining the tithe from the Parſon. Hereupon the biſhop of *Elie* his Officiall, did *ſequeſter* the ſaid wood cut downe. The Pariſhioner did breake and *violate* the *ſequeſtration*. therefore the Officiall proceeded with him *in cauſa violationis ſequeſtri*. the defendant purchaſed a *prohibition*. Neuertheleſſe, vpon diſcuſſing of the matter, a *conſultation* was granted in theſe wordes: *Licitè procedere poteritis, quatenus de* [5] *violatione ſequeſtri ſyluæ caduæ exciſæ (ratione decimæ inde rectori eccleſiæ debitæ, iniuſtè detentæ & non ſolutæ) per vos ſic interpoſiti, agitur: & vlteriùs facere poteritis, quod ad forum Eccleſiaſticum noueritis pertinere.*

[4] Regi. fol. 44. b.

[5] Concordat. Clem. vnica de ſequeſt. poſſeſſ. & (quoad violat. interdicti) Clem. grauis. de ſententia excomm.

That *excommunication* is a *cenſure Eccleſiaſticall* almoſt all allegations afore, and *conſultations* in the *Regiſter* do ſhew.

That which next commeth to handling heere, is: that [6] the *Parſon* and *Vicar* haue the appointing of the Pariſh Clerke: who being ſo appointed, is to haue the cuſtomable fees of the Pariſhioners for his ſeruice, or elſe he may ſue for them in Court eccleſiaſticall. That *Conſtitution prouinciall* calleth theſe *eleemoſynas conſuetas*: and (I thinke) they may be comprehended vnder the word [7] *Largitiones charitatiuæ*, for which the *Regiſter* hath a *conſultation*, as being of eccleſiaſticall coniſance.

[6] Conſt. prou. Bonifacij. c. a noſtris. de conceſſ. præbendæ. & ibi Lindwood.

[7] Reg. fol. 52. b.

For goods (as a pound of waxe, &c.) due to a Church, and de-
[1] Reg.fol.30.b. teined; [1] the *Regiſter* alloweth the Church-wardens to ſue in court *eccleſiaſtical*, and to procure that the church may for them, be againe put in *poſſeſſion*.

Now follow (in this place) certeine crimes of *eccleſiaſticall* conuſance: and firſt ſuch, as be contrary to *pietie* towards God;
[2] c.2.de maled. namely *blaſphemie*, which [2] though in partes on the other ſide Sea (where *Ciuill* law hath place) it be *mixti fori*, that is, enquirable and puniſhable aſwell in the *temporall* as in the *eccleſiaſticall* court: yet in this Realme, I haue not learned of any puniſhment thereof (or for ſwearing) by any *temporall* power. Alſo *idolatrie*, and *errour in religion*; which are ſhewed to be of *eccle-*
[3] 5.Eliz.c.23. *ſiaſticall* conuſance, by [3] the ſtatute *De excommunicato capiendo*. Likewiſe *Apoſtaſie from Chriſtianitie*; which is the higheſt degree of *hereſie*: and therefore ſubiect to the ſame Court and penaltie. Laſtly, *violation and prophanation of the Sabboth*, to be puniſhable by a Court eccleſiaſticall, both the continuall *cuſtome* of the Realme, and the ſtatute of *Circumſpectè agatis*, (which doeth allow them to enioyne penance for ſinne) doeth make very manifeſt.

[4] Lindwood in c. circumſpectè. de foro competenti. V.mort.peccato. But we are to vnderſtand (as [4] *Lindwood* alſo well admoniſheth) that *euery mortall ſinne is not of Eccleſiaſticall conuſance: for then* (ſaith hee) *the iuriſdiction of the temporall ſword, were wholly ouerthrowen; ſeeing you could hardly name any cauſe, which vnder colour of the ſinne, might not be brought vnto conuſance eccleſiaſticall. But the ſaid ſtatute is to be vnderſtood, of ſuch ſinnes, the puniſhment whereof doth belong properly to a Court eccleſiaſticall.* That is all ſuch (as I doe gather) for which no remedie is prouided at the *Common* law, nor by the ſame forbidden to be dealt with, by a *Iudge eccleſiaſticall*.

And of this ſort, is *ſubornation of periurie*, in an *eccleſiaſticall* court and matter, tending to the breach of *iuſtice*: and *vnlawfull ſollicitation of a womans chaſtity*, *drunkenneſſe*, and *filthie ſpeech*, referred to the violation of *ſobrietie*.

Violation of a *ſequeſtration* or of an *interdiction*, is in this chapter touched afore. The *hindering and diſturbance to carry tithes* by wayes due and accuſtomed, is handled in the ſixt chapter of this part.

For

For ſundry crimes, the court *Eccleſiaſticall* may enioyne penance *corporall*, but not *pecuniarie*: and if it do, there lieth a *prohibition*. [1] *Notwithſtanding, if Prelates enioyne a penance corporall, and the partie will redeeme ſuch penances by money, if this money (ſo promiſed) be demanded before a Iudge ſpirituall, the kings prohibition ſhall holde no place.* And againe: *for* [2] *excommunication before a Prelate (for laying violent hands on a Clerke) where corporall penance is enioyned, if the defendant will redeeme it by giuing money to the Prelate or to the partie grieued; it ſhall be required before the Prelate, and the Kings prohibition ſhall not lie.* Furthermore, [3] *in defamation, Prelates ſhall correct in maner aboueſaid, the Kings prohibition notwithſtanding, firſt enioyning a penance corporall, which if the offender will redeeme, the Prelate may freely receiue the money, though the Kings prohibition be ſhewed.* And to the ſame effect, there is a *conſultation* in the *Regiſter*, [4] *viz. in a plea for recouerie of money promiſed to a Prelate or to the partie grieued for redeeming of corporall penance, (impoſed for laying violent hands on a Clerke) you may lawfully proceed, our prohibition notwithſtanding.*

1 Artic. Cleri. 9. Edw. 2. cap. 2.

2 Ibid. cap. 3.

3 Ibid. cap. 4.

4 Reg. fol. 53. b.

When a [5] *partie* proceeded with for ſome offence in Court Eccleſiaſticall, *ſubmitteth* himſelfe to ſuch order as the *Iudge* ſhall take with him, either at his *abſolution* from the ſentence of *excommunication*, or otherwiſe, doth after refuſe; for ſuch his refuſall, he may be dealt with, and puniſhed in Court *eccleſiaſticall*, and may be vrged by cenſures, to performe the order according to his *ſubmiſſion*, which the *Ordinary* ſhall ſet downe. Likewiſe may an *Ordinary* deale for *contempt* of his decrees or *iuriſdiction*; as may be perceiued, both by the ſaid *conſultation* againſt one *Lindſey* laſt alleged, and [6] alſo by another reported in the *Regiſter*.

5 Reg. fol. 55. a.

6 Reg. fol. 57. b.

And as *Ordinaries* may deale in the cauſes afore ſpecified: ſo may they alſo in the neceſſarie *acceſſories* and *dependences* of thoſe cauſes. And therefore they may adiudge *expenſes* againſt the partie ouercome in law; and by *cenſures* driue him, to payment of them. Example heereof we [7] haue in the *Regiſter*, where the plaintife in a cauſe of *defamation* failing in proofe, was condemned in *expenſes*; and could not auoid the paiment of them by the *prohibition* which he brought. therefore in another precedent there, it is thus ſaid: *Iuri eſt* [8] *conſonum, quod vbi cognitio*

7 Reg. fol. 51. a.

8 Reg. fol. 53. b. Goodall, of the liberties of the Clergie, by the lawes of the Realme.

cognitio cauſæ principalis ad forum eccleſiaſticum pertinet; & eius acceſſorium pertinere debeat. Vel ſic: iuri eſt conſonum, quod cui attribuitur cognitio in cauſa principali, eidem attribui debet executio eiuſdem. And there it is further ſaid, to this purpoſe: *Si prædicti 40. S. pro miſis & expenſis in cauſa diffamationis adiudicati fuerint, tunc ad executionem inde faciendam licitè procedere poteritis, prohibitione noſtra non obſtante.*

Fees due in Eccleſiaſticall Courts, and *Curates and Clerkes wages* deteined, come next in this place to be prooued of *Eccleſiaſticall* conuſance. I muſt confeſſe that for the two former of theſe, I doe not call to minde, nor hitherto finde by turning of my few bookes of the Common law; that any thing is written of them.

Now ſeeing that from time to time, as occaſions haue fallen out of due fees there to haue bene deteined, they haue bene *demandable* in the ſame Court eccleſiaſticall without bringing prohibition: it is ſome good inducement to leade vs to thinke, that they haue bene (without contradiction) alwayes yeelded to be of *eccleſiaſticall* conuſance. For, being ſuch matters as ſubiects haue a right vnto, and yet no writ lying therefore (as I take it) at the Common law (which [1] reaſon is the ground in ſtatute for granting *conſultations*, and of leauing cauſes of that nature, to the determination of an *Eccleſiaſticall* court) it will therefore follow, that theſe alſo doe belong to *iuriſdiction eccleſiaſticall.*

[1] Stat. de Conſultatione, 24. Edw. 1.

But touching *Clerkes wages*, called in the *Prouinciall conſtitutions eleemoſynæ conſuetæ*, and in the *Regiſter* conteined vnder the generall word of *Largitiones charitatiuæ*; I haue incidently ſpoken in this chapter afore.

There remaine yet ſome offences (ſet out by me to be of *Eccleſiaſticall* conuſance) which I finde not hitherto ſo auouched to be, by any writer of the *Common* law: yet are they ſo holden by the law *Eccleſiaſticall*, and by vſuall practice alſo without any *prohibition* or other impeachment. The firſt [2] of them is *forgerie* in an eccleſiaſticall mattter, or the vſing and ſetting out of *forged* letters knowing them to be ſuch: as of letters *teſtimoniales*, *of orders* taken, of *inſtitution*, and ſuch like. Next, is the burying (in vſuall buriall for other *Chriſtians* of [1] notorious

[2] c. dura. & c. falſarionum. de crimine falſi.

[1] notorious *Heretickes*; or of perſons dying *excommunicated*, and without repentance thereof. [1] c. qui cumque de hæret. in 6.

Thirdly, willing [2] and familiar cõuerſing with perſons, whom they knowe to be excommunicated *maiori excommunicatione.* [2] c. ſi concubinæ, de ſent. excom.

Fourthly [3] *frequenters of conuenticles*, which doth alſo come vnder *ſchiſme.* [3] Bald. in ca. cõuentic. de pace iureiurando firmanda.

Laſtly, vnlawfull [4] digging vp of corpſes buried, either vpon ſpite, or in any other ſiniſter reſpect whatſoeuer. [4] Extrau. deteſtandæ. de ſepultura.

I haue hitherto ſtoode vpon matters, wherein *Ordinaries* (by Law) may hold plea: to ſhew thereby, that they may *cite* in other cauſes then *Teſtamentarie* or *Matrimoniall.* For deale in them, or handle them they could not, vnleſſe the *party* which is pretended to offer the wrong, or to be the offendour, might be conuented, which is by *citation.* Therefore (beſides the authorities here and there in the former diſcourſe falling in by other occaſions, which might ſufficiently prooue that they may *cite* and compell men to come before them) I will now briefly vſe ſome further direct proofe to conuince; that in other cauſes then thoſe two, men may be *cited* before *Iudges Eccleſiaſticall.*

It appeareth by *Articuli Cleri*, that for any matter *Eccleſiaſticall* indefinitely, men might be *cited.* For vpon doubt mooued, whether the Kings tenants were ſubiect thereto, in ſuch ſort as others are: it is decreed, that [5] *ſuch as holde of the Kings tenure, may bee cited before their Ordinaries, and may bee excommunicate for their manifeſt contumacie, and after 40. dayes, may bee attached by the Kings Writte, as others.* The [6] preamble of another ſtatute proueth *Citations* euen of *men, wiues, ſeruants*, and *other the kings ſubiects for diffamations and tithes* (ſo they be vpon iuſt matter, and in due order) to be lawfull. The body of that ſtatute [7] prouideth, that *no Citation be made out of the Diœceſſe &c. where the partie dwelleth, but where ſome Spirituall Offence or Cauſe is committed or done, &c.* ſo that *à contrario ſenſu* in any other *offence* or cauſe *Spiritual* (as very many are afore proued to be) any ſubiect may be *cited* within his or her *Diœceſſe*, and in thoſe alſo there excepted, may be cited out of the *Diœceſſe.*

[5] Artic. Cleri. 9. Ed. 2. ca. 12.

[6] 23. H. 8. c. 9.

[7] Ibidem.

Likewiſe [8] *for Hereſie, the Archbiſhop of Canterbury may cite any of his Prouince if the immediate Ordinarie doe conſent, or do not his dutie.* In a ſtatute [9] made for tythes, *any man withholding them, ſhall*

[8] Ibidem.

[9] 32. H. 8. cap. 7.

be conuented according to the Eccleſiaſticall Lawes. And there is alſo mentioned *Compulſorie Proceſſe and cenſures of the Church.* In a ſtatute[1] of King *Edward* the ſixt, though for the body thereof it be repealed, yet thereby is teſtified; that *ſummons and citations be Proceſſe Eccleſiaſticall in all ſuites and cauſes of inſtance betwixt party and party, and in all cauſes of correction.*

[1] 1. Ed. 6. ca. 2.

Therefore ſeeing there is no colour, that onely *Eccleſiaſticall* perſons ſhall fall out to be deteiners of ſuch dueties *Eccleſiaſticall*, or that they onely will proue offenders in the *crimes* afore recited, neither can all *the Kings tenants*, nor yet *men, wiues, ſeruants and other ſubiects* be entended (for the moſt part) to be other then *Lay perſons:* we may ſafely conclude, that not only in cauſes *Teſtamentarie* or *Matrimoniall*, but in very many other afore noted, any ſubiect whoſoeuer, may be *cited* before his *Ordinarie*, or other competent *Iudge*. *Quod erat probandum*, as being the very *contradictorie* of the opinion, that we are in handling.

CHAP. XI.

That Lay men may be cited and vrged to take othes in other cauſes, then Teſtamentary or Matrimoniall.

THe thirde opinion nowe followeth, which is: that by the Lawes of the *Realme*, *no Lay man ought to be ſummoned or cited to make* (or take, as I thinke is meant) *an othe, in any other cauſe then Teſtamentary or Matrimoniall.* This differeth from the former in two points. The firſt is in the *partie* to be *cited:* For the ſecond opinion was, that *none whoſoeuer*, including both *Eccleſiaſticall* and *Lay:* where as this is onely, that *no Lay man may be cited, &c.* The ſecond difference is in the end of the *citation:* For here is ſaid: *a lay man may not be cited to take an oth* in any other cauſe: thereby leauing (as it might ſeeme) the *Ordinary* at large, to vrge perſons *eccleſiaſtical* to take an *othe*, in other cauſes alſo. But all comes to one ende. For if neither *Lay* nor *Eccleſiaſticall* (as the ſecond opinion holdeth) may be *cited* in any other cauſe: then cannot *Eccleſiaſticall* men be cited in any other cauſe, to take an *othe*. That which cannot be done at all, cannot be done for any ende. *non entis nulla ſunt qualitates.*

qualitates. ſo that both theſe runne to one point, ſauing that hereby is affirmed, a *citation* may not be made to the intent a *Lay* man ſhall take an *othe*, ſauing in thoſe two caſes.

Now if this *citing* be meant of the *partie* defendant; then doth it not impugne any proceeding *eccleſiaſticall* in vſe. for the partie conuented, is not cited *ad ſubeundum iuramentum*, but *ad reſpondendum tali in cauſa decimarum, &c. & faciendum vlteriùs quod iuris fuerit & rationis.* If it be meant of witneſſes, neither are they *cited* (againſt their will) not ſo much as in *Teſtamentarie* or *Matrimoniall* cauſes, or any other, to appeare; till faith be made by the *partie*, or by ſome other for him, that they take them to be *neceſſary witneſſes* for to teſtifie in that cauſe; and that being required, and their reaſonable charges offered them, they doe neuertheleſſe without cauſe refuſe to come, and to teſtifie a trueth. For then goeth a *citation* called *Compulſories* for them, *ſub pœna iuris* to come and depoſe their knowledges in ſuch a matter, betwixt ſuch *parties.* So that the *citation* is not *ad ſubeundum iuramentum*, albeit when they come, they are not to ſet downe any depoſition, but vpon *othe*: becauſe it is *iuris diuini, naturalis, & gentium, quòd non credatur teſti iniurato.* Alſo the *Authour* of this opinion ſhould haue done well, to haue ſignified whether a *Lay* man being come thither without *citation*, might then be vrged to take an *othe.* Therefore if the *Authour* here of, wil hereby maintaine any controuerſie againſt *Courts Eccleſiaſticall*; the iſſue muſt be, either that to make the *Defendant* put in his anſwere vpon his *othe*, (ſo farre foorth as he by Lawe is bound) or to make *witneſſes* teſtifie vpon their *othe*, is a thing contrary to the Lawes of the *Realme.*

But it appeareth by diſcourſe vpon the former opinion, in how many ſundry cauſes of *litigious Iuriſdiction*, (beſides *Teſtamentarie* and *Matrimoniall*) *Ordinaries* may holde *Plea* (by the Lawes of this *Realme*) according to the courſe of the *Queenes eccleſiaſticall* Lawes. That the *eccleſiaſticall* Lawes doe require this courſe (with the cautions aforeſaide,) I thinke no man that knowes any thing in that Lawe, will make doubt. A *Plea* is a conflict in cauſe of Iudgement, betwixt one that affirmeth, and another that denieth. There be but two wayes (beſides the *parties confeſſion*, which is not properly called a proofe) to

prooue any thing: that is, by *witneſſes*, or by a *publicke inſtrument*, called by the *Common* Lawe, *matter of Record*. Now if witneſſes might not be vrged to teſtifie vpon *othe*, in any cauſes but *Teſtamentarie* or *Matrimoniall*; then could no *Plea* be holden in any other cauſe, when the chiefeſt and moſt vſuall meanes of proofe in recent facts, be taken away.

This libertie and priuiledge of holding *Plea* in the cauſes afore ſhewed, and in this maner as is now claimed,[1] *by the goodnes of Princes of this Realme, and by the Lawes and cuſtomes of the ſame* (as a ſtatute rehearſeth) *appertaineth to the Spirituall Iuriſdiction of this Realme*, and hath bene in all ages, vſed in *Courtes Eccleſiaſticall* without impeachment, as by the Recordes thereof may appeare. And therefore, vpon any ſingular conceite (newly taken vp by ſome priuate perſons) it is not ſafe to be nowe thus queſtioned, and oppugned. There is an olde Statute in force (as I take it) that may greatly bridle ſuch newe quirkes, except men were marueilous well aſſured of the groundes of ſo great and ſo generall an innouation. For it is enacted, that [2] *great Officers about the King, and in his Courtes of Iuſtice, ſhall from time to time forwarde, bee ſworne when they ſhall be put in Office, to keepe and mainteine the priuiledges and franchiſes of Holy Church, &c.*

[1] 24. H. 8. c. 12.

[2] 15. Ed. 3. c. 3.

Can it with any colour be intended, that the *Common* Lawe doth allow Courts *eccleſiaſtical* to hold *plea* in thoſe ſundry other cauſes, which we haue hitherto proued to be *eccleſiaſticall:* and yet, that it wil not allow them any meanes or poſſibilitie whereby to hold ſuch *pleas?* For if no *Lay* man might be *cited* to an *eccleſiaſticall* Court, and there ordered to take *othe* in any other cauſe then thoſe two: then firſt the *partie* conuented (if by Lawe he needed not) would neuer anſwere to the *Libel* vpon his *othe*. Yet hath this bene a courſe continually practiſed, and by Lawe ſo appointed, not onely in *Eccleſiaſticall*, but alſo in all Courtes of the *Ciuill* Lawe both here and throughout the reſt of *Chriſtendome*.

Againe, if no *Lay* witneſſes may be called to teſtifie in any other matter; then ſhould moſt men in thoſe cauſes, be hereby either quite forecloſed of their right; and many groſſe ſinnes ſhould paſſe wholly without reformation or puniſhment: or elſe

all

all ſuch matters muſt needes be prooued, onely by ſuch witneſſes that be of leaſt indifferencie; and therefore of leaſt trueth and credite. For thoſe men be alwayes moſt *indifferent*, which either be friendes, or at leaſt be no euill-willers, to either partie. Nowe ſeeing euery depoſition muſt needes tende to the grieuance or hinderance of the one partie or the other: can it be preſumed of him which loues both, and doth wiſh alike well vnto them, that he will willingly and *gratis* without any proceſſe come and depoſe, and thereby doe one of his friendes a diſpleaſure? there reſteth then, that onely ſuch will offer themſelues to teſtifie; who either be *enemies* vnto both, or *friendes* to one, and either *enemies* or *ſtrangres* to the other (and howe can theſe be vpright & *indifferent* witneſſes?) or elſe ſuch who be meere ſtrangers vnto both ſides. but it doth moſt rarely happen, that meere *ſtrangers* vnto both, ſhalbe able to depoſe any thing to purpoſe: and more rare will it be, that ſuch will offer willingly of them ſelues, to come in *ad teſtificandum*. Beſides theſe and many ſuch like abſurdities, neceſſarily enſuing this opinion; if it be yet ſtill ſtoode in, that the *Common* lawe permittes *compulſion* of lay men (whether parties or witneſſes) to take othe in cauſes *teſtamentarie* and *matrimoniall*, but denies it in all other caſes: let vs conſider, what may be imagined for a probable reaſō of ſuch differēce in proceeding betwixt cauſes that belong to the coniſance of the ſelfe ſame courte. For I haue read and often heard, that the *Common* lawe is grounded vpon good and ſound reaſon. And it cannot be ſaid in this caſe: *quamuis durum ſit, tamen ita lex ſcripta eſt*. for that this is no ſtatute, or written lawe; but onely the reported opinion of one man, whence all the reſt haue ſince taken it. Was it then meant, to giue vnto ſubiects an ample meanes of comming by their *rightes* in theſe two cauſes: but to reſtraine or debarre them in al other, as namely for *tithes* and other rightes demaundable in *eccleſiaſticall* courtes? or was it the purpoſe of that lawe, to haue men ſtand conuicted of moſt grieuous crimes that be of *eccleſiaſticall* coniſance (as happely of *Hereſie*) being neither by them confeſſed, nor yet proued by ſincere and *vpright witneſſes*: but onely by ſuch, as doe thruſt them ſelues in to beare witneſſe; whom not onely common ſpeach, but alſo ſundry *ſtatutes* doe terme *Accuſers*, and therefore doe hold at leaſt for par-

ties and men not indifferent? May not many other *eccleſiaſticall* cauſes be of as great importance & preiudice, as (perhaps) a *will* of goods vnder xl.s. or a trifling *legacie*, or a x. pound matter, promiſed with a *woman in mariage?* and if the law had bin ſo, could no man hit of it from the *Conqueſt*, vntill our fathers time, when *Fitzherbert* wtit his *noua natura breuiū?* was none of skil in *Edw.* the 1. time, to put it into the ſtatute of *circūſpectè agatis:* or in *Ed.* the 2. times, to mention it in the ſtatute of *Articuli Cleri?* did none reade it in the *Regiſter* that vnderſtoode it, before *Fitzherbert?* or was it not put downe there, but in ſome late copies, as is moſt likely? And after he had ſet it downe, would not the law in that behalfe haue bin vrged againſt ſundry *Biſhops*, that practiſed the contrary in *K. Hen.* the 8. time, & continually ſince, if that opinion had bin holden for good lawe? Touching this matter, the *Treatiſour* ſaith thus in effect: that *the not cōpelling of witneſſes to ſweare & to depoſe their knowledges, brings none other preiudice; but that the partie plaintife, faileth in his proofes thereby.* Why? is that no ſmall preiudice, for a man (which hath in deede a right) to haue the cauſes goe againſt him, through the wilfulneſſe of witneſſes, ỹ neither will come of thēſelues, nor may be cōpelled by others, as this opiniō importeth? Is not this to giue cauſe of acquiting the wrōg doer, & of cōdemning him that hath the very right? and doth it not nouriſh or at leaſt tolerate that ſinne in the witnes, which is cōdemned by the law of God in theſe [1] wordes, viz. *If any haue thus ſinned, that is, if he haue heard the voyce of an oath, & he can be a witnes, whether he hath ſeene or knowen of it, if he doe not vtter it, he ſhall beare his iniquitie?* In which place I doubt not, but all ſuch be included; who knowing the matter which is in examination or queſtion before a *Magiſtrate*; ſhall refuſe neuertheleſſe (being duely called) to giue teſtimonie to the trueth, according to their knowledges. The *Treatiſour* further ſaith: that it may be ſufficiēt for a *court eccleſiaſtical*, to haue no better meanes for bringing in of witneſſes to teſtifie, then *tēporall* courts haue. Truely if they might be allowed the ſame; I thinke none of them would deſire any better. For when a witneſſe is vnwilling to depoſe, vnleſſe he be vrged by *proceſſe*; what is more vſuall in *tēporall* courts, then to haue a *ſub-pœna* to charge him to appeare, and to teſtifie, at ſuch a time & place? But becauſe by this his ſay-

[1] Leuit. 5. V. 1.

ing

ing (it ſeemeth) he entendeth, that the courſe of vrging *witneſſes* to teſtifie (as is claimed, & alwaies hath bin vſed by courts *eccleſiaſticall*) conteineth ſome *repugnancie* againſt the lawes of the Realme: therefore, for cleering of that point, I wil briefely ſhew, that it is not ſo much as a *diuerſe*, and much leſſe a *contrary* or *repugnant* order, vnto the lawes of this Realme.

Firſt for practiſe; what is more frequent, then for *Iuſtices of the peace* to binde men by *recogniſance*, to giue in euidenc at *Seſſions* or *Aſſiſes* touching ſuppoſed offendours?

It would be ouer tedious to ſet downe the ſundry caſes reported by the booke of *Aſſiſes* to this effect: viz. that *where a deede is pleaded & denied; and proceſſe againſt the witneſſes is deſired; that it ſhall go out to call them to teſtifie.* It wilbe ſufficient to referre you, to [1] *Brookes Abridgemẽt*, where they be gathered: (yea *though the act* [2] *perſonall*) *if a deede with witneſſes at it be pleaded & denied: proceſſe ſhalbe awarded for the witneſſes, per Markham & Rolfe.*

[1] Brooke titule teſtmoignes.
[2] 1.H.6.5.

Be not *Iurours* alſo (that be ſummoned to paſſe on trials) fined, if they appeare not? and what more equitie to *amerce* or fine them, then *neceſſarie witneſſes*? ſeeing trials can no more be made without *euidence*; then they may without a *Iurie*?

By ſtatute; [3] *Iurours* for triall of *Periurie*, are appointed to be fined, if they refuſe to make apparance.

[3] 23.H.8.ca.3.

Likewiſe *if any* [4] *witneſſe be ſerued to teſtifie in a court of Recorde, and hauing tendred (according to his countenance) his neceſſarie charges, doe not appeare: he ſhall forfeite tenne poundes, and make further recompence, according to the loſſe.* So that we ſee, it is no *contrary* or *repugnant* courſe to the *Common* lawes, to haue witneſſes vrged to teſtifie; being there alſo practiſed. But if here it be replied, that the *Common* lawe forbiddeth it vnto courtes *eccleſiaſticall*, ſauing in thoſe two caſes: it will eaſily appeare, that it is ſo farre from being forbidden, that it is indeede allowed vnto them, by *Common* lawe and by ſtatutes. There be very many precedents in the *Regiſter* of *conſultations* graunted, vpõ debating of the ſeuerall matters there, after that *prohibitions* had bene purchaſed: in euery of which almoſt general wordes of allowance of the maner of proceedings, *according to the lawe eccleſiaſticall*, be conteined, as [5] namely allowing of the proceeding *iuxta Canonicas ſanctiones:* & ſetting in the end of euery *cõſultatiõ* there (except

[4] 5.Eliz.ca.9.

[5] Reg. in br. orig. fol. 56.b. & fol. 57.b.

two

two or three) these or the like wordes in effect, viz. *Licitè procedere, & vlteriùs facere poteritis, prout ad forum ecclesiasticum noueritis pertinere, prohibitione nostra non obstante.*

Nay let an *instance* be giuen (if any man can doe it) where of olde, any such *prohibition* hath gone foorth, and not bin reuersed againe by *consultation*, yea almost where it hath gone foorth at all; onely for censuring a witnesse, that refused to come in and testifie, in any other matter of *ecclesiasticall conisance*, besides *testamentarie* and *matrimoniall*. And yet hath it bin in continual and vninterrupted practice, for so long time as any *ecclesiasticall actes* now remaining, do mention *pleas* in those courtes to be holden.

Iustice Brooke in his *Abridgement*, both testifieth that by the *Ciuill* lawe, witnesses (which wilbe holden *indifferent*) should not come till they be called, and setteth it downe as a matter woorth the noting; whereby may be gathered his allowance thereof. The [1] wordes be these: *By the Ciuill lawe, Accusers be as parties, and not as witnesses; for witnesses ought to be indifferent, and not to come till they be called: but Accusers doe offer themselues to Accuse &c. quod nota.*

[1] Brooke tit. Corone, nu. 220.

That by the *Ciuill* and *Canon* lawe witnesses may be vrged to giue testimonie, and in what sort, wil appeare by this distinction. By the *Ciuill* lawe, [2] witnesses may be vrged to giue testimonie, and that without distinction, whether the cause be *Ciuil* or *Criminall*: be *Ciuilly* or *Criminally*, directly, or by way of exception moued: except their persons be *priuiledged*. As by [3] the law *Ciuill* men of 70. yeeres of age be in this behalfe; viz. that they may not (against their willes) be vrged to testifie.

[2] l. si quando C. de testibus.

[3] l. inviti. ff. de testibus.

By the *Canon* lawe, if the cause be *Ciuill* and not *criminall*, witnesses may be compelled (without distinction also) except they be persons *priuileged*. Neuertheless euen [4] *priuileged* persõs may be cõpelled, in want and defect of other proofes; that the trueth may be found out.

[4] Panor. in c. dilectorum. de testibus cogendis.

If the [5] cause be *criminall*, whether *Ciuilly* or *criminally* moued, so the action be *directly* moued for the *crime*, and not by way of *exception* or barre onely: witnesses are to be compelled. sauing that by later *Canons*; *Clerkes* were not to be compelled to testifie, in *causes of blood*.

[5] Alphon. Villag. lib. 3. ca. 15. concluf. 12.

But if the question be touching a *crime*, by way of *exception*: then,

then, either there may enſue thereupon ſome effect of *puniſhment*, (as vpon excepting a man to be criminous, who then is to be preferred to a *dignitie*, to a *benefice*, or vnto *orders*) in which caſe any witneſſe may be compelled to giue teſtimonie: or elſe no penaltie can thereupon follow, (as when the *exception* is taken onely to repell a man from teſtimonie or *accuſation*) and in this caſe witneſſes are not compellable, except the partie who excepteth, be like to be grieuouſly thereby preiudiced; if his witneſſes cannot be gotten to depoſe.

There is nothing more conuenient, then that euery court ſhould vſe his peculiar courſe of proceeding, by that law (wherin they deale) preſcribed. And therefore [1] *lay mens matters in a Court eccleſiaſticall, are to be handled according to the maner of proceeding by that law required: euen as* [2] *clerkes ſhall and ought to be dealt with in temporall or ciuill courts, after the maners and orders of thoſe courts.*

[1] Anton. in c. quod clericis. de foro competenti.
[2] Bartol. in l. 3. § fin. ff. de teſtibus.

Seeing then, compelling of witneſſes to *teſtifie*, is not *contrariant*, *repugnant*, nor yet *diuerſe* from the Common law; nor by it forbidden, but allowed vnto *Eccleſiaſticall* courts, *according to the courſe of thoſe lawes*; which doe require it (as is ſhewed) and no reaſon or equity leading to admit it rather in thoſe *two cauſes*, then in others of the ſame coniſance: therefore may any witneſſes whatſoeuer be vrged to take oath and depoſe in Courts eccleſiaſticall, and in other matters eccleſiaſticall, then either *teſtamentarie* or *matrimoniall*.

But to deſcend yet to more particulars: *the Kings tenants may* [3] *be cited before their Ordinaries as others.* Therefore both they and others (though *Lay* perſons) may be cited in all cauſes of that iuriſdiction: neither is it there diſtinguiſhed, whether they come in as *witneſſes*, or as *parties*. Alſo *they may* [4] *as others be excommunicated, for their manifeſt contumacie.* This *contumacie* (after appearance) groweth onely vpon *peremptorie* refuſall to performe ſome decree or commandement of the Iudge, as in refuſing to be *ſworne*, or to be *examined*, being ſworne. Seeing then for *manifeſt contumacie* the *Kings tenants or others* may be *excommunicated*, and this is indefinitely ſet downe: it will follow, that as in any other not performance of the decrees of the Iudge (according to the *eccleſiaſticall* lawes) ſo in refuſall to be

[3] Artic. Cleri. 9. Ed. 3 cap. 12.
[4] Ibidem.

 ſworne,

ſworne, whether he be partie principall or witnes, there is *manifeſt contumacie. Vbi lex non diſtinguit, nec nos diſtinguere debemus.*

Particularly in matter *of tithes* (being neither a cauſe Teſtamentarie nor Matrimoniall) *the* [1] *contemners of the proceſſe, lawes and decrees of the Eccleſiaſticall courts of this Realme*, are by ſtatute condemned: but an vrging to anſwer or teſtifie vpon oath, is a *decree* of an *Eccleſiaſticall Court, ergo*, may not be contemned. *The Ordinarie* [2] *in a ſuite of tithes for any contempt, contumacie, diſobedience, or other miſdemeanours (vpon complaint) may haue the partie committed, till he ſhall be bound to giue due obedience to the proceſſe, &c. decrees, and ſentences of the Eccleſiaſticall court of the Realme:* but requiring a parties or a witneſſes oath, is ſuch a decree. Therefore, &c.

[1] 27.H.8.

[2] Ibidem.

Likewiſe by another ſtatute, [3] *the Ordinarie may conuent for withholding tithes according to the lawes Eccleſiaſticall:* therefore he may conuent and cite a man *Lay* or other (if he be ſuppoſed to be a withholder) to anſwere vpon his oath. For ſo is the *Eccleſiaſticall law.*

[3] 32.H.8.cap.7.

Further, by that ſtatute, *the* [4] *Ordinarie may proceed to hearing and determination &c. according to the courſe and proceſſe of the eccleſiaſticall lawes:* but the proceſſe and courſe of hearing by that law, is by the parties *perſonall anſwere* vpon *oath*, if it be required; and by *compulſories* of witneſſes to depoſe by oath, as is afore touched. Therefore, &c.

[4] Ibidem.

The ſtatute of [5] king *Edward* (touching tithes) prouideth, that *both they and the coſts, charges, and expenſes in the ſuite ſhall be recouered before the Eccleſiaſticall Iudge, according to the kings Eccleſiaſticall lawes:* but for recouery of them, thoſe lawes require (in caſes aforeſaid) both oath of partie and of witneſſes: *ergo, &c.*

[5] 2.& 3.Edw.6. cap.13.

By that ſtatute is eſtabliſhed, that *the* [6] *Ordinarie euen for perſonall tithes may call the partie afore him, and by his diſcretion examine him by all lawfull and reaſonable meanes, other then the parties owne corporall oath, concerning the true payment of ſuch perſonall tithes. Ergo* a corporall oath is in other eccleſiaſticall cauſes a *lawfull and reaſonable means:* for, *exceptions are alwayes of the nature of the rule*, and ſhould be within the rule, if they were not excepted; and therefore alſo in all other *tithes*, as *predial* and *mixt*, it is a *lawfull and reaſonable meanes* to put the *partie* vnto his *oath, quia exceptio*

[6] Ibidem.

exceptio firmat regulam in caſibus non exceptis.

The ſtatute for *Vniformity of Common prayer*,[1] authoriſeth *eccleſiaſticall Iudges to enquire, to take accuſations, and informations, and to puniſh the breaches of that act &c. in like forme as before had bene vſed in like caſes by the Queenes Eccleſiaſticall lawes:* but in like caſes (by thoſe lawes) *oathes* both of *parties* & *witneſſes* haue bene vſually taken. Therefore, &c.

[1] 1. El. 2. cap. 2. ad finem.

One only inſtance deſtroyes a generall aſſertion; therefore if there were but any one inſtance to the contrary, an oath by law may be vrged of ſome *lay* man in ſome other cauſe then *teſtamentary* or *matrimoniall:* which being true, and the very *contradictory* of the opinion that is in iſſue (vpon this point) betweene vs, it muſt needs follow that the opinion is vntrue, and therefore not grounded vpon law: *Quod probandum nobis proponebatur.*

CHAP. XII.

The grounds of the two next former opinions examined and confuted

THe ground of theſe two *opinions* laſt handled (for any thing that I could euer learne) doeth only reſt vpon a precedent of a writ of *prohibition* and of attachment thereupon. In treating whereof (for that I ſhall be forced to gainſay ſomething, that is deliuered by graue, learned, and wiſe parſonages) I muſt firſt proteſt before *God* in ſinceritie of heart, that I do it not *calumniandi, ſed veritatis ſtudio*; whereof I am ſomething reſolutely perſuaded, in this behalfe. I do reuerence and eſteeme them that are contrary perſuaded, being men of great learning in their profeſſion: neither contemning nor condemning any, ſo much as my ſelfe, as being moſt priuie to mine owne wants, and therefore (I truſt) ſomething taught to meaſure my ſelfe by mine owne foot. *Sed amicus Plato, amicus Socrates, magis amica veritas.* The copy of this writ, I finde reported and ſet downe in two ſeuerall books. In the [2] *Regiſter* (contrary to the vſe of other precedents there) is deliuered but a parcel (as ſeemeth) of a writ, in two or three lines, in theſe words, *viz. Rex vicecomiti S. Præcipimus tibi, quòd non permittas quòd aliqui laici ad citationem talis epiſcopi aliquo loco conueniant de cætero,*

[2] Regiſter tit. prohib.

tero, ad aliquas recognitiones faciendas vel ſacramenta præſtanda, niſi in cauſis matrimonialibus & teſtamentarijs. T. &c. And in the margent thus: *Prohibitio ne laici conueniant ad citationem epiſcopi, ad recognitionem faciendam.*

But the precedent of *attachment* framed vpon this writ, runneth generally, without excepting ſo much as theſe two cauſes; euen as if a *lay* man (whether *partie* or *witneſſe*) might not be vrged to anſwere or teſtifie, or to take an oath except he luſt, in any cauſe *eccleſiaſticall* at all. For it is [1] thus, *viz. Rex vicecomiti Salutem. Pone per vadium &c. talem epiſcopum, quod ſit coram iuſticiarijs noſtris &c. oſtenſurus quare fecit ſummoneri, & per cenſuras eccleſiaſticas diſtringi laicas perſonas, vel laicos homines & fœminas; ad comparendum coram eo, ad præſtandum iuramentum pro voluntate ſua, ipſis inuitis; in graue præiudicium coronæ & dignitatis noſtræ regiæ; necnon contra conſuetudinem regni noſtri. & habeas ibi nomina pleg. &c. T. &c.* And in in the margent it is entituled thus: *Attachiamentum inde.*

[1] Reg. in br. orig. fol. 36. b. tit. Prohibitiones.

Alſo in the *Abridgement* of ſtatutes [2] gathered by *Raſtall*, I do finde a precedent of a *prohibition* ſet downe at large, mentioning a writ to like purpoſe to haue bene ſent to the *ſhiriffe*; but none attachment thereupon: whereof thoſe words rehearſed in the *Regiſter* (though ſomething altered) ſeeme to be a parcell. In that point it is thus: *Rex epiſcopo Norw. Salutem &c. Mandauimus etiam vicecomiti noſtro comitat. Norf. & Suff. &c. quòd non permittant quòd aliqui laici in Ballina ſua, in aliquibus locis conueniant, ad aliquas recognitiones per ſacramenta ſua faciendas, niſi in cauſis matrimonialibus & teſtamentarijs.* Whereby theſe three varieties do appeare, betweene this, and the former: Firſt, that which is ſaid heere by way of rehearſall, that the king had ſent ſuch a writ to the *ſhiriffe*; ſeemeth in the *Regiſter* to be ſet downe as conteining part of the writ it ſelfe, directed to the *ſhiriffe*.

[2] Abr. Raſtall tit. prohib. & conſult. nu. 6.

Secondly, that which is here *recognitiones facere per Sacramentum*, is in the *Regiſter* with the diſiunctiue; *viz. ad aliquas recognitiones faciendas, vel Sacramenta præſtanda.* Thirdly, in the *Regiſter* theſe words are added; *ad citationem talis epiſcopi.* That writ which *Raſtall* ſetteth down at large (whēceſoeuer he had it) ſeemeth to be the perfect & whole copy of the originall, & therfore of more credit. It is alſo probable, that the gatherer of the

Regiſter

Regiſter did abridge out of this Writ at large, as hee thought good. For in the very Writs that went foorth in deed (the copies whereof bee in the *Regiſter*) letters (for the moſt part) bee put there, in ſtead of the names of the parties: whereas, here it is *ad citationem talis epiſcopi, & talem epiſcopum*, without name or any letter for it; that might direct men to know, of what Writ it was a parcell; which argueth, it was not *verbatim* copied foorth of the Writ. Howſoeuer it be, the one of them muſt expound the other, ſeeing they concerne one and the ſelfe ſame matter.

In treating therefore hereof; I mind firſt to ſhew, that albeit theſe words did carie the ſence ẏ is inforced; yet it may be, that the law is otherwiſe, then ẏ they are not of that acceptiõ: & laſtlie how they are otherwiſe meant, & what is that true meaning.

For the firſt, it is no lawe of neceſſitie; being neither *Statute*, nor *Common* lawe. No ſtatute: for it is not in the *Parliament rols*, nor in any printed booke of ſtatutes at large, nor in ſundrie ancient written copies. It is no *common* law: for it is ſayd to be *formata prohibitio ſuper articulis cleri*[1] (which is a ſtatute of late time in compariſon) and the precedent of that *Prohibition* (as it is in the *Regiſter* printed, & being vnderſtood according to the mind of the Authors of this opinion) is contrarie to the generall cuſtome of the Realme. For by time immemoriall, all *Eccleſiaſtical* courts (without impeachment) haue cited both the parties principall for anſwere; and witneſſes alſo, vrging them to depoſe by oath, in all the other ſeuerall cauſes alſo, that are prooued afore to be of *eccleſiaſticall* iuriſdiction and conuſance.

[1] 9. Edw. 2.

I haue had of long time an olde *Regiſter* in parchment written (as may be euidently gathered, and appeareth by the frame of the hand and letter) about king *Edward* the ſeconds, or king *Edward* the thirds time. In it there is no ſuch precedent of *prohibition*, or of *Attachment*; as either the printed *Regiſter*, or *Raſtals Abridgement* of ſtatutes, ſetteth downe. But there are many *prohibitions* vnto *eccleſiaſticall* courts, that run in this ſort, viz. *Ne teneatis placitum in curia chriſtianitatis de catallis & debitis, quæ non ſunt de teſtamento vel matrimonio.* And the firſt of this ſort is thus entituled in the margent: *Prohibitio regia de catallis & debitis quæ non ſunt de teſtamento vel matrimonio.*

One thing beſides I find there (in mine opinion) worth the noting

ting for this purpoſe; yet not obſerued in the printed *Regiſter*. For ſuch precedents of Originall Writs, as exceeded the memorie of any man, at what time they were firſt drawen & framed: that old booke ſetteth downe ſimply without any addition. But if they were of later times deuiſed; then this marke & title is giuen vnto them in the margent, viz. *Prohibitio formata*, or *breue, &c. formatũ*. Now *Raſtals Abridgement* giueth the like title to the writ (wherupon this controuerſie groweth) viz. *Prohibitio formata ſuper articulis cleri:* which argueth that there is no ſuch original writ of old at the common law; but that it was thẽ newly deuiſed to meete with a new miſchiefe. *Quæ de nouo emergũt, nouo indigent auxilio.*

The being of it in the *Regiſter*, doth not make it of neceſſitie to be law; for ſundry of thoſe writs were framed of late times (as may appeare to any that wil peruſe thẽ) vpõ particular mẽs ſuits (& as occaſiõs fel forth) & ſomtimes (perhaps) drawn vpõ priuate ſuggeſtiõs of the counſel of one ſide, though afterward allowed.

Nay in my ſaid old written *Regiſter* of writs, there is a precedẽt which (as I take it) goeth not now for lawe. For there is a direct writ to the *ſhirifs* of *London*; ſignifiyng, that no *Clerke* (though he forfeit his recognizance of *ſtatute merchant*) ſhalbe attached or impriſoned by his body: except there bee ſome cauſe why hee ſhould not enioy the priuiledge of a *Clerke*.

Beſides, it is no new or ſtrange thing, to haue ſome forme of a writ which is ſet down in the *Regiſter*, to be vpon better aduiſe diſallowed. For I haue credibly heard, that it was not long ſince adiudged, that in an action for treſpaſſe, done in a warren of Conies, a mã might not plead that they were *cuniculi ſui*; albeit the *Regiſter* (in that behalfe) [1] frameth the writ ſo. And in the ſelfe ſame title (whence this forme of *prohibition* is taken) a clauſe in a *prohibition* was [2] reiected by the court. For it is ſaid in the margẽt, *Curia noluit concedere iſtam clauſulam in prohibitione:* but if it were law aſſured, the Iudges would not haue reiected it.

[1] Reg. fol. 102. tit. de tranſgreſſione.

[2] Reg. fol. 37.

[3] No. na. br. fol. 37. G.

Fitzherbert (who in his booke [3] *of Nature of writs*, was the firſt that ſucked this conceit thence) in the ſelfe ſame booke touching this rule, ſet downe in the *Regiſter*, viz. *notandum eſt, quòd quando rex præſentat vt in iure coronæ, tunc incurrit ei tempus:* ſaieth thus; *now this rule is not holden for lawe.* But it will bee ſaid, that *Fitzherbert* himſelfe, and ſundry that follow him ſince, doe hold this point we ſpeake of, for lawe. This (no doubt) carieth a great pre-

ſumption with it,& that worthily; for the worth of the learning & iudgements of ſuch men. Yet I wil ſhew that his ſaying (from whom they all ſince do take it) is none vndoubted rule of lawe; & therefore theirs neither, that do gather from him. I proteſt before God, I wil not ſeeke after obiections againſt his booke; but take only ſuch two (in ſtead of mo) which I had in my mind, becauſe they do touch *eccleſiaſticall* matters. He ſaieth, that [1] *at the Common law, an heretike ere he can be condemned, muſt be conuicted of hereſie before the Archbiſhop, & the whole Clergie of the prouince, & after abiured thereupon; & after that (of freſh) conuicted & condemned by the clergie of that prouince: & this muſt be in their general councel of conuocation:* & holdeth there; that *at the Common law, a biſhop in his diœceſſe might not condemne an heretike, vntill 2. H. 4.* [2] *did giue him authoritie: & that then he might not be committed to the ſecular power to be burnt, vntil he had once abiured, & was againe relapſed into that, or ſome other hereſie.* But neither of theſe points be law; & ſo I haue heard the two *chiefe Iuſtices*, the *L. chief Baron*, & ſome other Iudges, & the Queens learned councel, reſolue in a ſpeciall conſultation holden about the matter of hereſie. For albeit the *Conuocation* may (in deed) condemn an heretike, yet euery B. at the *Common* law (before any ſtatute) might (& at this day may alſo) in his own *diœceſſe* ſo condemn; as the preamble of that very ſtatute makes manifeſt: & ſo by thē all, was it then holden for lawe, notwithſtanding *Fitzh.* opinion there; which was fully by thē conſidered of. And albeit it may ſeeme needleſſe, yet for further ſtrengthening of theſe reuerend mens opinions, there is a [3] booke in the very point. For it is ſaid, *that for hereſie or any point againſt the faith, the BB. had none other power to bring thē in, but to make proceſſe againſt them by citations, vntill the Statute of Hereſie, 2. H. 4. ergo*, afore that ſtatute, they had power to proceed againſt *heretikes*, in *Ordinarie* courſe of the lawe *eccleſiaſticall*. Which aſſertion the very *Note-gatherer* alſo maketh in his title *of the lawes of England*, yet to another purpoſe: howſoeuer in the maine point ỹ we now treat of, he ſticke faſt to *Fitzherbert*.

1 Fitzh. ibid. fol. 269. D.

2 2. H. 4. cap. 15.

3 10. H. 7. fol. 17.

Likewiſe, [4] he ſaith *it appeareth that before the ſtatute made* pro clero *in the 18. of king Edw. 3. cap. 7. the right of tithes were determinable in the Temporall court of the king; and that the lawe was altered at that time herein, by that ſtatute.* Whereas (in very trueth) there

4 Fitzh. no. na. br. fol. 30. F.

there appeareth no such matter; other then a grieuance offered (in this behalfe) to the libertie of the Church, which then was determined, that it should afterward cease.

I know that *Goodall* (writing *of the liberties of the Clergie, by the lawes of the Realme*) concurreth in this point with *Fitzherbert*: for thus he writeth; *It seemeth that before the Statute, the right of tithes were determinable in the Temporall courte: but that statute hath altered the law.* So that it may be coniectured, the one of them borowed it of the other.

But this whole doubt, whether causes of *tithes*, before that statute of *Edw. 3.* were determinable in an ecclesiasticall court or no, is resolued by a *Treatise* nipping (in trueth) wholie at the *Clergie* and lawes ecclesiasticall, and so indifferent an Vmpier, as that the *Note-gatherer* alleageth him for his purposes: therefore in this case not to be refused by them, who produce him for their witnesse. For that [1] *Treatise* writeth thus, viz. *Long after that the kings courts of his Bench & commõ Pleas, & also all inferior courts were put out of iurisdiction for tithes: yet neuertheless Writs of Scire facias were commonly sued in the Chancerie for tithes, and the defendants were thereupon put to answere: wherefore at the petition of the clergie, and in consideration of a disme that the clergie grãted to the king, it was enacted 18. E. 3. ca. vlt. that such Writs of Scire facias, thenceforth should not be granted for tithes.* And a litle afore [2] thus, viz. *That suites for tithes shalbe taken in the Spirituall court, is only groũded vpon a fauour, that the kings of this realme, & the whole realme, haue in times past borne to the clergie.* And [3] againe in this sort: *We thinke that the kings courts be put out of iurisdictiõ for tithes, by a custome of the realme, & not by the immediate power of the lawe of God.* Therfore (by this mans opinion) it is the common law or custome of the land; and not that statute, which made tithes of conisance ecclesiasticall.

[1] Of the power of the Clergie, and lawes of the realme, cap. 15.

[2] Ibidem.

[3] Ibidem.

And in very trueth that tithes were demandable in a court ecclesiastical before this; may appeare by statutes afore that time, & by reports after; testifying that the conusance of right of tithes (at the Common law) is incident to iurisdiction ecclesiastical, as in the peculiar [4] treatise thereof, is afore shewed.

[4] Ca. 4, 5, & 6. huius Partis.

Lastly, (to shut vp this first point) a precedent of a *prohibition* of all other Writs that can be deuised, may with least reason bee said,

ſaid, neceſſarily to report what is lawe: for that *Prohibitions* are ſo often reuerſed & diſanulled againe, by *conſultations*: as might haue happened in this very matter; for any thing that can be certainely knowen, as well as in any other ſuch like.

For the ſecond point, that *Recognitionem facere*, ſimply and abſolutely, cannot ſignifie the anſwere vnto the Libel of the partie conuented, nor the depoſition of witneſſes, may appeare: becauſe this fourme of *Prohibition*, is ſaid to be *formata ſuper Articulis Cleri*. But out of them no ſuch matter can (with any colour) be gathered; & therefore being taken in ſuch ſenſe, muſt needes be a gloſe beſides his text.

Againe, I finde in the fourme of another writ in *Fitzherbert*, where *Sacramento recognoſcere*, ſo being ioyned together, [1] doth ſignifie a teſtification by oath. Likewiſe in ſundry [2] writs of the *Regiſter*, *recognitio per ſacramentũ vel recognoſcere per Sacramentũ*, is vſed for a depoſition, vpon oath. But where *Recognitionem facere* (without further addition) ſhould ſignifie a *parties anſwere*, or *witneſſes depoſition*, I doe not call to minde that I haue read in any, ſo much as pretending to write *Latine*.

[1] Fitzh. nou. na. breu. fol. 31.
[2] Reg. in br. Iudic. fol. 7. a. 12. a, & 75. a.

Howeſoeuer it might be ſhewed in other, ſurely in that *Prohibition*, which is in the *Regiſter* (for auoiding many abſurdities) it cannot ſo ſignifie. for the *Regiſter* reades it, that the *Sherife* ſhall not permit laye men to come together in any place, *ad recognitiones faciendas, vel Sacramenta præſtanda*, but in thoſe two cauſes. So that by the *diſiunctiue* (*Vel*) whatſoeuer *recognitionem facere* be there: neither that may be done, nor an *oath* in any other cauſe may be taken by any *Lay* man whatſoeuer, though otherwiſe he were willing. For the word *Laici* is indefinite, not reſtrained to any one ſort of *Lay* men: and ſo that which is here forbidden, is ſimply forbidden to all *Lay* perſons, and in al other cauſes, whether they be parties or witneſſes, willing or vnwilling, with oathe or without oathe. For in the *Prohibitiõ* there, no mentiõ is made of that clauſe, which the *attachement thereupõ* doth inſerte, viz. *ipſis inuitis*. So that, if that precedent of *Prohibition* be of it ſelf perfite: this which I haue ſaid, doth thereupon neceſſarily follow. But if anything be to be vnderſtood, which is not expreſſed: then why may we not (for recõciling of *Raſtels* writ & this together) ſafely affirme; that they be both to be vnderſtood, of *recognitions*

and *oathes* giuen (in deede) in *eccleſ.* courtes, but yet touching *goodes* & *chattels*, no way concerning matter, either *teſtamentarie*, or *matrimoniall*. It cānot be truely ſaid, that *recognoſcere* is *Sacramentū præſtare*, or *recognitio*, to be the ſame that *Sacramentū ipſū*, the oath it ſelf. This is proued by the precedēt of that very *prohibitiō* in the *Regiſter:* where they are diſtinguiſhed, as two ſeueral things, with a particle *diſiunctiue*. And likewiſe by the writ, in *Raſtals Abridegemēt*. for there the *recognitiō* is forbiddē to be *made*, *per Sacramentū*: & therfore not the ſame, but diuerſe things: ſeeing no matter is the ſelfe ſame thing with that; which is but his *adiunctē*. Then being not the ſame things, & both forbiddē; and preſuppoſing the interpretatiō that is vrged: it wil follow that no *Lay* defendant neede, nay he may not *recogniſe* (though without oath) or make any anſwere at all, in any other cauſe *eccleſ.* then thoſe two. So that there wil neuer be iſſue ioyned; and ſo no *plea eccleſiaſticall*, ſauing in thoſe two cauſes. For will any defendant (thinke ye) make any anſwere at al, either whē a thing is demaūded of him that he liſt not to yeeld vnto; or when he is cited to be puniſhed; if neither he neede doe it, nor yet may by law, though he would? But admit the defendant would be willing, & would aduenture the daunger of lawe, for anſwering to the plaintife, & ioyning iſſue with him: yet how many ſuch *pleas* could proceede any further; whē no *lay witneſſes* might be vſed, either with oath or without oathe, to *make recognition*, or to *depoſe?* And if *Raſtals* writ be law, & ſo to be vnderſtood, as is nowe enforced: ſo that witneſſes may not teſtifie in other cauſes then thoſe two *ſuper ſacramenta ſua*; their depoſitiōs (as of men vnſworne) muſt needes be meerely void, by al lawes diuine & humane. So that if the *prohibition* be not meant of holding *plea* touching *goodes or chattels* in other cauſes, it muſt needes ſort to this point; that in no cauſe (beſides thoſe two) any *lay perſō* may (by law) though he would, come to anſwere or teſtifie, with an oath or without an oath, in a court *eccleſiaſtical*. But this is abſurd & vnreaſonable to imagine, and wilbe ſo confeſſed, euen by thoſe who ſtand in this opinion: and therefore that muſt needes be alſo abſurd, whereupon it neceſſarily followeth. For *omne verum vero cōſentaneū:* and, by the rule of reaſon we knowe, *Ex veris poſſunt nil niſi vera ſequi.*

Nowe for proofe that it is abſurd and contrary to lawe, thus I proceede:

proceede: No plea can be holden, but where there is one that affirmeth, and another which denieth that which is affirmed: and then either matter of recorde or witneſſes muſt be vſed, to proue the intention of the plaintife: But in ſundry other cauſes then thoſe two, *pleas* (by law) may be holden in a court *eccleſiaſticall*; (as I hope) manifoldely and ſufficiently, is afore ſhewed in this *Treatiſe:* and therefore in thoſe other cauſes, *Lay* men may, and ought to *anſwere* and *teſtifie:* which is the contradictorie of that, which doeth neceſſarily followe, vpon this their interpretation. So that this concluſion being true, the contradictory of it is vntrue; and then that vntrue alſo, whereupon it is neceſſarily conſequent. For (as I ſaid afore) I truſt no reaſonable man will conceiue, that onely *eccleſiaſticall* men will prooue deteiners of ſuch *eccleſiaſtical* dueties, and culpable in thoſe offences, that are proued (afore) to be of *eccleſiaſticall* conuſance: nor yet that they only ſhal alwayes happen to be preſent, and able to beare witneſſe, in all thoſe other ſeuerall *eccleſiaſticall* cauſes, afore touched.

Furthermore to make it more plaine, and to deliuer it in ſeueralty; *recognitionem facere* cannot ſignifie (in this place) the anſwere of the party conuented. For if a lay man againſt whō there is cauſe of action, vpon ſome other of the matters *eccleſiaſticall* liſt not, nay if he neede not, and which is more, if (by law) he may neither come to the place, nor (being come) may anſwere either yea or no; then could no *plea* at all in any ſuch *eccleſiaſtical* cauſe be holden. If it be ſaid, that a *Lay* man muſt anſwere, but not by oath in ſuch other cauſe: I replie againe, that either the *Regiſter* hath not the writ aright printed, or elſe this no way can be ſo meant. For by the *diſiunctiue (vel)* when the propoſition is negatiue and prohibitiue, as it is here, both the one and the other is forbidden to be done. [1] A *diſiunctiue* argueth ſeueral things, that had neede to be expreſſed by ſeuerall wordes.

[1] Arg. l. 13. cùm ita. ff. de rebus dubiis.

And by like reaſon it cannot be meant of *witneſſes* depoſitions: for if the partie conuented ſhall be content *de facto*, (though he be not compellable by lawe, as this opinion preſuppoſeth) to denie the intention of his aduerſarie; then no *Lay* witneſſe might in any ſuch other cauſe *eccleſiaſticall*, be vſed, either to depoſe with oathe or without oathe; becauſe both be forbidden, and ſo no plea in any ſuch other *eccleſiaſticall* cauſe coulde be holden,

which is afore prooued to be otherwiſe: and therefore conſequently, that is not the meaning of theſe wordes of the writte, which is (by [1] *Fitzherbert* and others that follow him) enforced.

[1] Fitzh. nou.na. breu.fol.41.2.

Touching the writ of *Attachement* thereupon whether (as it is ſet out in the *Regiſter*) it may be holden to haue bin an *originall writ* at the *Common* law, drawen (at firſt) by the graueſt aduiſe in the Realme; & to be ſo perfite, as that nothing (further then is expreſſed by the words) neede therein to be vnderſtood to come by the true meaning: may partly be gathered by that which followeth. Firſt it is ſaid, *pone talem epiſcopũ*, not vſing letters for his name, as in moſt of the other writs. Next, a *Biſhop* (who in that he hath a *Barony*, is preſumed to haue temporalties whereon to be diſtreined) is here appointed to finde *vadios & plegios*. Thirdly, it hath *laicos homines & fœminas*; as if women were not *homines*; ſeeing *homo* is the cõmon gender. Fourthly, though the *prohibition* (whereupõ it is framed) forbiddeth both *recognitiõs to be made, and oathes alſo to be taken by lay men:* yet the *Attachement* wholly omitteth the *making of recognitions*. And yet howe many *oathes* ſoeuer ſhould be giuen if none *anſweres or depoſitions* doe thereupon euer followe (which two the opinion that we impugne, meaneth by *recognition*) what colour of preiudice doeth or can growe, that either *Prohibition* or *Attachement*, ſhould neede to be awarded? Fiftly, neither by *Ciuill* nor *Canon* lawe; neither yet by practice; doth any ſommons or citation goe out of an *eccleſiaſticall* court, in ſuch ſort, as this *Attachement* aſſigneth, to be a preiudice vnto the royall dignitie, viz. *ad comparendum coram eo, ad præſtandum iuramentum, pro voluntate ſua; ipſis inuitis*. For it were a grieuance giuen (euen at the *Canon* lawe) if an *Ordinarie* ſhould either call any being not a partie or neceſſarie witneſſe in ſome matter depending, or ſhould call witneſſes againſt their will, not being firſt required, and hauing their charges offered; or if he ſhould do it, when there is no cauſe, but [2] *for his owne pleaſure*, as this writ implieth. Sixtly, the proceeding hereby condemned, is ſaide to be done; *in præiudicium graue, coronæ & dignitatis noſtræ regiæ*. But if no matters be thereby drawen from the kings courtes, as in deede none be (though you followe the interpretatiõ thereof by ſome enforced) then what preiudice commeth to the crowne? For, though lay men be vrged to depoſe

[2] Pro voluntate ſua.

vpon

vpon their *othes*, in all other cauſes beſides, that be of *Eccleſiaſticall* coniſance; what damage or detriment doth the *Crowne* and *dignitie royall* thereby ſuſteine; more then it doth by their compulſiue depoſing with *othe*, in cauſes *Teſtamentarie* and *Matrimoniall*, which this opinion admitteth and alloweth of? For if none other cauſes *Eccleſiaſticall* then thoſe two, could conueniently be proceeded in, nor any remedy could be giuen by a court *Eccleſiaſtical*, for want either of the *parties anſwere*, or *witneſſes depoſitions* vpon *othe*: yet could not *Temporall* Courts (as the Lawe ſtandeth) giue any more remedy in them. And ſo no preiudice to them or to the *Crowne*, that Courtes *Eccleſiaſticall* do proceed as they do, to the determination of ſuch cauſes. Nay rather on the other ſide it were a preiudice to the *Crowne*, that ſubiects ſhould offend, and no good meanes ſhould be found by Law to puniſh them; or to haue a right, & yet no way for them to come by it.

Seuenthly, that which is there condemned, is ſaid to be [1] *contra conſuetudinem regni noſtri.* which doeth ſtrongly argue, that vrging *parties* in other *Eccleſiaſtical* cauſes to put in their *anſwere* vpō their *othes*, or *witneſſes* ſo to teſtifie; is neither by that fourme of *Prohibition* forbidden, nor by the *Attachment* thereupon, ment to be diſallowed. For (firſt) the *cuſtome* of diuers Courts *Temporal*, requireth *parties anſweres* vpon *othe*; and likewiſe alloweth Writs of *ſub pœna* and other *proceſſe* (in ſundry caſes) to compel *witneſſes* to come in, and to teſtifie their knowledge.

[1] Conſuetudine præd, vſi fuerimus ſemper libertatibus huiuſmodi. Prohibition in Raſtell, t.t. Prohib. nu. 6.

And againe; in Courts *Eccleſiaſtical*, the cuſtome hath alwayes bene, to require *othes* of *parties* and *witneſſes* (though otherwiſe vnwilling) in maner as is afore touched. Which may appeare, both in that the Lawes *Ciuill* and alſo *Canon*, which they deale by, doe require it: and that no bookes of *Actes Eccleſiaſticall* (as I am verely perſwaded) can be ſhewed, whether of olde or later times; by which it may not appeare, that this courſe of compelling *parties* and *witneſſes* to take *othes*, in other cauſes then thoſe two; hath bene vſed, ſo often as occaſion hath required. And therefore not this, but ſome other maner of proceeding it was; which by the Writte of *Attachment* is meant, to be *contra conſuetudinem regni.*

Laſtly, this fourme of *Attachment*, mentioneth not ſo much, as excepting of compelling to take *othe*, in cauſes *Teſtamentarie*

and *Matrimoniall*; albeit the *prohibition* haue that exception. And therefore for auoyding of iarre betwixt them, ſomething muſt neceſſarily be vnderſtood, to haue bene at firſt in the Writ it ſelfe (whereof this is a minute) further then is here expreſſed. And why ſhall not then, the clauſe *de catallis & debitis* be vnderſtood therein, aſwell as this other; ſeeing ſo ſtrong probabilities doe leade it, and ſo many abſurdities and inconueniences be thereby auoyded; which the late enforced interpretation doth (neceſſarily) inferre with it ſelfe?

Therefore wee may conclude this ſecond point: that to debarre Courtes *Eccleſiaſticall*, in any cauſe of that *Iuriſdiction*, from exacting *parties* conuented to put in their *anſweres* vpon their *othes*, or from compelling ſuch *witneſſes* (by cenſures) to teſtifie, who being required, and their neceſſary charges being offered, doe neuertheleſſe refuſe to teſtifie a trueth: is not, nor yet can be, the meaning of that *Prohibition*, or of the *Attachment* thereupon.

The laſt point of the three to be touched, is concerning the true meaning of thoſe wordes of the Writte, whence theſe controuerſies haue flowed. It is therefore to be remembred, that it was very vſuall for men in thoſe dayes, at making of any contracts, whether in matters of *Lay fee* or others, for their more ſecuritie, to *make faith* or *othe*, for performance. This they either did priuately, for confirming of deedes drawen betwixt them: or elſe (for more readineſſe of diſpatch and better teſtimonie) they [1] would recognize one to another ſuch contractes, with faithful promiſe (called *fidei præſtatio*) and ſometimes with [2] corporall *othes* voluntarily taken before *Ordinaries*, and therefore procure an Acte to be made by a *publicke Notary*. Then, if either *partie* failed in performance, he was by *Proceſſe Eccleſiaſtical* called before the *Ordinary*, as to anſwere for an Acte done afore him, or *pro fidei læſione:* which failing, being confeſſed or proued, the *Offendour* was enioyned grieuous penance, and (no doubt) oftentimes compelled by *cenſures*, to keepe his *faith* or *othe*, by ſatisfying of the other *partie*.

[1] Regiſter.pag. 37.
[2] Regiſter.pag. 43. monſtrauit nobis Matilda.

This courſe being ſo ready at their owne doores in euery *Diœces*, and of ſo ſpeedy execution; for the great feare then caried (by moſt ſorts of men) vnto the *cenſures Eccleſiaſticall*, and for grieuouſnes

nouſnes of the penance otherwiſe; grew to be very vſuall in euery place; as may partly appeare by the often diſputes vpon *prohibitions* brought hereupon (euen after this Writte was framed) that are here and there mentioned in the bookes of the *Common* Law, and are afore touched by me in [1] the 8. Chapter: and partly may be ſhewed by ſundry old euidences and *inſtruments*, recorded in ancient *legers*, and in *Acts* of *Eccleſiaſticall* Courts, before the time of *Edward* the ſecond, which I haue ſeene and peruſed. Namely I haue ready to be ſhewed, a ſolemne contract in writing made almoſt 400. yeres agone: wherein the *Earle* of *Arundel*, vpon a concord then made for himſelfe and his heires, promiſeth and graunteth to the *Archbiſhop* of *Canterbury* and to his ſucceſſors, certaine red deere and fallow of both ſeaſons, yeerely for euer, to be at a certaine place deliuered for the *Archbiſhop*, out of the foreſt of *Arundel*. For the obſeruation whereof, he there bindeth himſelfe and his heires, by a corporall *othe* taken; and further graunteth, that if he or they faile herein, then the *Archbiſhop* ſhall excommunicate them ſo failing, and keepe them vnder the ſame *cenſure*, till the purport of that agreement be performed.

[1] c. 8. huius part.

I haue likewiſe to be ſhewed, an olde written booke of [2] *Acts Eccleſiaſticall*, ſped in the *Audience* Court of the *Archbiſhop* of *Canterbury* in the reigne of King *Edward* the firſt, wherein ſundry ſuites *pro leſione fidei* of that nature be conteined. The thing which gaue colour hereunto, was the pretence of auoyding and puniſhing the ſinne of *Periurie*. For the *Canon* Lawe ſaith thus: *Iuramenti cauſa, regulariter quis forum Eccleſiaſticum, & non ſeculare ſortitur.* c. prædicandum. 22. q. & D D. in c. cum ſit ex. de foro competenti.

[2] 23. Ed. primi.

If (ſaith a learned writer on [3] the *Canon* Lawe) *the Action be touching an othe in reſpect of the Court Pœnitentiall, or be commenced for releaſe of the bonde of ſuch othe, ſo that it reſpect not principally the commoditie of ſome Lay perſon: or if it bee doubted, whether the othe be lawfull or not, be to be kept or not; then the coniſance of it doeth belong to a Court Eccleſiaſticall.* And in [4] another place thus: *When the partie to bee damaged by violation of the othe, is ſuch, as cannot vſe Action: or when enquirie is made for the correction of the Crime; then may the Iudge Eccleſiaſticall enquire*

[3] Panorm. in c. cum ſit. de foro competenti.

[4] Panor. in c. qualiter. el. 2. de accuſat.

enquire euen againſt a Lay man not obſerning his othe. Inſinuating, that in all other caſes, violating of *othes* by that Lawe belongeth to the coniſance of a *Temporall* Court. And the ſtatute alſo of *circumſpectè agatis* which alloweth puniſhment by the Court *Eccleſiaſticall for breach of an othe*, but diſtinguiſheth not there, in what cauſes or how farre, did giue herein ſome incouragement. So that the miſchiefe that grew hereupon was this: that moſt *Lay* contracts *of goods and chattels* were by this meanes drawen into *Eccleſiaſticall* Courts, though (in trueth as I thinke) contrary to the *Common* Lawe of the Realme. For if the *principall* matter be of *Lay* conuſance, for confirmation whereof ſuch *faith* is made, or *othe* taken; then (according to the diſtinction [1] afore prooued out of the *Common* Law) it is not ſuch *faith* or *othe*, that will change the authoritie of the Court, to make it ſimply of *Eccleſiaſticall Iuriſdiction.* For ſo [2] *Bracton* writing in the time of *Henry* the 3. teſtifieth, and withall giueth good light and euidence, to the interpretation hereafter following, of thoſe words of this Writ: *Iuriſdictionem regiam non mutat fidei interpoſitio, ſacramentum præſtitum, nec ſpontanea partium renuntiatio, quamuis ſibipſis in hac parte præiudicent per conſenſum: & illud idem dicendum erit de debitis & catallis, quæ non ſunt de Teſtamento vel Matrimonio, vel eorum ſequela.*

[1] Cap. huius partis 8.

[2] Bracton, lib. 5. cap. 9.

It was [3] one of the *hundred Grieuances* which the *Germaine* nation complained of: *that Ciuill cauſes and contracts, by pretence of faith or othe giuen, were drawen into Eccleſiaſticall coniſance.*

[3] Grauam. 64.

Therefore to meete with this miſchiefe, and to cut off the occaſion, this Writte of *Prohibition* ſeemeth to haue bene framed, *viz.* to forbid *Lay* men in any place, either before *Ordinaries*, or in priuate amongs themſelues, to make any *recognitions* or acknowledgings: whereof? *of debts, or of cõtracts touching goods and chattels* by their *faiths* or *othes* taken, in any cauſe whatſoeuer, beſides *Teſtamentary* or *Matrimoniall.* For in theſe two cauſes neither then, nor at any time ſince (as in part is afore ſhewed) was it vnlawfull, for *Lay* men to make acknowledgement and depoſe in a Court *Eccleſiaſticall* vpon *othe*, though it touched goods and chattels. In matters *Teſtamentary*, as in *Probats*, and in *legacies* of goods and chattels in demaund; in matter of *innentaries*, and of *accounts* of the deads goods and chattels. In matters

ters *matrimoniall*, as in *money promiſed with a woman in mariage*, as is more fully ſhewed in the 3. Chapter. And ſo this *writ* is not ſimply prohibitorie of all *Recognitions and Oathes* (by lay men) in *Eccleſiaſticall* Courtes, excepting thoſe two cauſes: but onely forbiddeth *Recognitions and oathes* in other cauſes made or taken, that doe touch *debtes, goods* and *chattels, or other ſuch lay contracts*, and all *citing* of *parties* to take them, or which haue taken them, and all *citing* or compelling of *witneſſes* to depoſe touching ſuch contracts about *goods* and *chattels*: though confirmed by *faith* or *othe* of the contractours.

Nay there is ſtrong euidence to be brought; that not many ſcores of yeeres, before the 9. of *Edward* the 2. (when as *Articuli Cleri* were enacted, whereupon that *Prohibition* is ſaid to be framed) the *Clergie* both vſed, and thought they ſhoulde haue wrong to be barred from hearing all breaches of *faith* and *periuirie* ariſing of, or touching what cauſe ſoeuer: ſo they dealt not with the very *Temporal* cauſes themſelues whereupon ſuch *faith* or *othe* was confirmatorie. *If* (ſaith a *Conſtitution*[1] *Prouinciall* of *Canterbury*) *perhaps our Lord the King in his Attachments, prohibitions, ſummons, ſhall make mention not of tithes, but of right of Patronage: not of breach of faith or periurie, but of chattels: not of Sacrilege, or diſturbance of liberties Eccleſiaſticall, but of treſpaſſes of his ſubiects, the correction of which, he affirmeth doth belong to him: then let the aforeſaid Prelats make known vnto him, that they neither take coniſance, nor minde to doe, touching Patronage, chattels, or other things belonging to his Courts: but of tithes, ſinnes, and other cauſes meere Spiritual, belonging to their Office and Iuriſdiction.* Whereby we firſt gather, that the *Common* Law herein was not then reſolutely agreed vpon; in that they conceiued, this allegation touching *faith broken* and *periury*, would ſatisfie the *King* and his *Courts*. And ſecondly that the *Kings Writs of prohibition* and *Attachement* (in this behalfe) were then awarded, but for *faith* and *othes* made, concerning *goods and chattels*, becauſe by that pretence, the coniſance of *chattels* was drawen into *Eccleſiaſticall* Courtes.

[1] Cõſtit. æternæ ſanctio. de pœnis. in Concilio apud Lambhith ſub Bonifacio Anno 1260. tempore Henrici 3.

I do finde in an old written parchment booke of ſtatutes, reaching downe but to H. 5. death; many matters of marke conteined amongs the ſtatutes. As among others there be, *regiæ conſuetudines*

ſuetudines apud Claringdon promulgatæ. which (as is there rehearſed) were by *K. Henry* the ſecond, propounded in *Parliament* vnto *Thomas Becket*, then *Archbiſhop* of *Canterbury* long before that *Prouinciall conſtitution.* Moſt of which, he did condemne by his *cenſure*, as preiudiciall to the liberties of the Church: And this is ſaid there, to haue bene the originall cauſe, firſt of his baniſhment, and after of his death. But ſome of thoſe cuſtomes, *Becket* did tolerate; whereof this is one, ſeruing to our preſent purpoſe, viz. *Placita de debitis, quæ fide interpoſita debentur, vel abſque interpoſitione fidei, ſint in curia regis. Hoc tolerauit.*

At the ende of that *Treatiſe* it is ſaide; that *foure yeeres after Beckets death, viz. 1174. of Chriſt; the King repenting himſelfe, did together with the Prelates and great men of his kingdome, abrogate and condemne thoſe euill and vniuſt cuſtomes; appointing onely thoſe that were good, to be thencefoorth obſerued. Yet* (ſaith he) *ſome of thoſe that were ſo abrogated by the king, and condemned by the Church; are ſtill obſerued in the kingdome. If this be with the kings knowledge and allowance, let the King looke to it, for God knoweth it.*

The chiefe cauſe why I note it, is this: that it was euen then thought a *Cuſtome* of the *Realme*; and by *Becket* himſelfe allowable and tolerable; that *Pleas of debts, though faith or othe were giuen for their payment, belonged to the Kings temporall Courtes.* Next is, that hence may be gathered, how the *Recognitions* and *othes* forbidden to be made in Courts *Eccleſiaſticall* by the Writs which we here diſpute of; are to be vnderſtood of ſuch of them onely, as concerne *debts or chattels*; ſauing that *in cauſes Teſtamentary and Matrimoniall* onely, they may be there made and acknowledged, albeit they concerne *debts and chattels.*

It may alſo appeare euidently, that the *Recognitions* forbidden to be made in Courts *Eccleſiaſticall* in any cauſe ſauing of *Teſtament* or *Matrimony*, ought to be vnderſtoode of *Recognitions* and *othes* about *debts* and *chattels.* For lightly in euery place, where theſe two matters of *Teſtament* and *matrimony* are ſpoken of, there alſo *debts* and *chattels* are ſpoken of to this effect; that in theſe two caſes, *Pleas* of *debts* and *chattels* may be handled in Courts *Eccleſiaſticall*, but in none other. *Bracton* (who wrote before this Writte was framed) ſaith thus: *Si Clericus petat verſus*

[1] Bracton lib. 5. cap. 2.

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[1] Ibidem.

[2] Ibidem. lib. 5. cap. 3. & cap. 10. & 13.

In the [3] booke of *Entrees* the like is often found, as *Attachiatus fuit ad reſpondendum tam Domino regi quàm N. de placito, quare ſecutus eſt placitum verſus eum in curia Chriſtianitatis, de catallis & debitis, quæ non ſunt de Teſtamento vel Matrimonio.* And in a [4] copie of *Conſultation* there: *callidè machinans impedire, ſuggerénſque in Cancellaria noſtra ipſum tractum fuiſſe in placitum coram vobis in curia Chriſtianitatis, de catallis & debitis quæ non erant de Teſtamento vel Matrimonio &c.* Yea, and in [5] the *Regiſter* it is ſet downe more plaine a great deale in a copie at large of a *Prohibition*, vpon the ſame point, and with the ſame cauſes excepted, being the next following to that which wee (principally) doe here treate of. For the very worde of *Recognitio* before an *Ordinary*, is there vſed and applied to a *debt or contract touching goods and chattels. Cum recognitiones debitorum (quæ non ſunt de Teſtamento vel Matrimonio) ad nos, coronam & dignitatem noſtram (& non ad alios) pertineant in regno noſtro: & executiones earundem per nos & miniſtros noſtros (& non per alios) fieri debeant: ac iam ex querela I. acceperimus quod vos ipſum I. ad viginti ſolidos, quos coram vobis nuper in curia Chriſtianitatis recognouit ſe debere A. eidem A. ſoluendos intra certum tempus iam præteritum monuiſtis, & in ipſum I. pro eo, quod prædictos viginti ſolidos intra tempus prædictum, ad monitionem veſtram ſoluere recuſauit, (quanquam huiuſmodi recognitio Teſtamentum vel Matrimonium non tangat) &c. excommunicationis ſententiam fulminaſtis &c. vobis prohibemus, &c.* And the very like words, to the ſame effect, and with like exceptions, are there vſed in the fiue precedents of *Prohibitions*, next in order following.

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[4] Conſultat. 2.

[5] Regiſter. Ibidem tit. Prohibitiones.

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[5] Regiſter. Ibidem tit. Prohibitiones.

And in the olde written *Regiſter* (afore ſpoken of) there be many copies of *Prohibitions* ſet downe; in all which whenſoeuer that exception of cauſes *Teſtamentary* and *Matrimonial* is mentioned, that clauſe *de catallis & debitis quæ non ſunt de teſtam. &c.*

commeth in withall. In the printed *Regiſter* among the Writs *Iudicial*, we haue theſe [1] words: *Quare ſecuti ſunt placitum in curia Chriſtianitatis de catallis & debitis quæ non ſunt de Teſtamento vel Matrimonio.* And againe: [2] *cum traxiſſet in placitum in curia Chriſtianitatis de catallis & debitis, quæ non ſunt de Teſtamento vel Matrimonio &c. prohibitionem impetrauit.* We haue further, in the *Regiſter* of *originall* Writtes, to this effect: [3] *Quatenus ad correctionem animæ & non placita de catallis & debitis concernunt, &c. licitè ex officio procedere poteritis, &c.* And in diuers other Writs of [4] *Conſultation* there, to this purpoſe: *Prohibitionem noſtram impetrauit, aſſerens ſe trahi in placitum in curia Chriſtianitatis, de catallis & debitis quæ non ſunt de Teſtamento vel Matrimonio &c.* Inſo much, that this [5] Writ is entituled as by his name thus: *Prohibitio noſtra, or regia de catallis &c.*

1 Regiſt. in Br. Iudic. fol. 38. a.

2 Ibid. fol. 39. a.

3 Regiſt. in Br. origin. fol. 57. b.

4 Regiſt. in Br. orig. fol. 46. quater. & 49. a.

5 Regiſt. in Br. origin. fol. 46. b. & 49. a. in fine.

I finde a *Conſultation* in the [6] *Regiſter*, where is rehearſed: that certaine *Lay* men of *Couentree* were by *compulſories*, called into an *Eccleſiaſticall* Court, as *neceſſary witneſſes* (in trueth) in a cauſe of *legacie*; yet they to auoyde apparance, and to obteine a *Prohibition*; ſuggeſted that they were drawen into the Court *Chriſtian* to teſtifie, about *chattels and debts, not belonging to teſtament or Matrimony.* Now if that meaning (of the Writ in controuerſie) which we here impugne, were true; what needed they to haue mentioned *chattels and debts* at all? for then, the other part of their ſuggeſtion (though falſe) had bene (in Lawe) ſufficient, to haue obteined the *prohibition*, viz. That they were called, *againſt their wils*, to teſtifie in a *Court Eccleſiaſticall*, touching matters, being neither *Teſtamentary* nor *Matrimoniall.* But ſeeing they were driuen to pleade both: it argueth, that *citing* men to take *othes*, and to depoſe againſt their wills, in any other cauſe then thoſe two; is not ſimply and abſolutely prohibited; but for that the matter concerneth *chattels and debts*, and yet is neither *Teſtamentary* nor *Matrimonial.* And therefore not that (which of late is enforced) but this meaning of the Writ by me deliuered, is the true interpretation thereof.

6 Regiſt. in Br. orig. fol. 54. a.

The very Writte it ſelfe ſet downe by [7] *Raſtall* at large, doth eſtabliſh this interpretation: *Rex Epiſcopo Norwicenſi &c. ſalutem. Cùm cognitiones placitorum, &c. ſuper ſuratis Recognitionibus Laicum feodum contingentibus, & rebus alijs ac cauſis pecuniarum, & alijs*

7 Abridgement of the ſtatutes. Prohibition. 6.

& alijs catallis & debitis (quæ non de teſtamento vel matrimonio) ad coronam & dignitatem noſtram pertineant &c. for, if *Iurata recognitio* (being in the ſame writ) ſhould ſignifie a diuerſe thing: then muſt we needes ſay, that the recital ſpeakes of a matter to be remedied, and yet the remedie giuen is of another nature, and ſo not purſuant to the former.

Furthermore, the tenour of that writ runneth to the *Biſhop* of *Norwich*, and to his *Archdeacons, &c.* yet thoſe wordes thereof, (whereupon the doubt riſeth) are not directed to *them*, as if *they* ſhould be charged thereby (which had bin moſt apt, if any ſuch thing had bin meant) not ſo to *cite lay men*, or that *they* ſhould not charge them with ſuch *oathes*, or that *they* ſhould not ſuffer ſuch *Recognitions* to be made afore *them:* but it is there ſaide, that the *King* had commaunded the *Sherife*, that *he* ſhould not permit, *quod laici conueniant in aliquibus locis ad faciendas recognitiones, &c.* which vſe of the wordes *ne laici conueniant*, and the changing of the perſons, argue ſtrongly that it was meant of ſuch *recognitions of debts and chattels*, and ſuch *oathes*, as *Lay* men of themſelues were willing ynough to make; and therefore had neede of ſuch reſtraint, by the *Sherifes* authoritie. which their voluntarie perfourming thereof, without vrging by cenſures; is alſo argued by that which is there ſaid of the *Ordinaries* accepting at *Lay* mens hands of ſuch things: viz. *vobis præmiſſa, & alia conſimilia, in partibus illis, acceptantibus.* This of their willingneſſe without conſtraint, is alſo prooued by the wordes immediatly following the point in controuerſie, viz. *& ne ſuper huiuſmodi feodis, debitis & catallis, coram vobis & alijs iudicibus Eccleſiaſticis, in præiudicium iuriſdictionis noſtræ regiæ ad coronam & dignitatem noſtram ſpectantibus, ſubire præſumant.*

Whereby (as in a thing needefull) *Lay men* are charged not to dare or preſume in any *other* cauſes before *Ordinaries* to make any ſuch *Recognition or oathe*, touching *goods* or *chattels*, preiudiciall to the *Crowne*: by which wordes, this our interpretation is expreſſely eſtabliſhed. Nowe if thoſe wordes in the copie of the *Prohibition* and of the *Attachement* in the *Regiſter* ſhalbe obiected againſt this, viz. *Ad citationem talis Epiſc.* And thoſe, *Ipſis inuitis:* I anſwere, that for many abſurdities thereupō following, which are afore noted; theſe wordes cannot ſtand with the writ

in *Raſtall*, nor with the interpretatiõ that is by ſome of late vrged. But vnderſtanding them (as I declare) of *citations* and *compulſories* to make anſwere or teſtifie by oathe, concerning *chattels* and *debtes*, not belonging vnto matter *teſtamentary* or *matrimoniall*; maketh al moſt aptly to agree together. For whether we ſay, that *Ordinaries* then vſed to *cite* all in generall of their *Diœceſſe*, who had made promiſes or contractes in lay cauſes, by worde onely, (or by writing) to come and confirme them, by their *faith* giuen, or by their *corporall oathes* before them, for better confirmation and ſecuritie of the bargaine, as ſome wiſe and learned haue thought very[1] probably: or whether they be meant of *citing* parties to put in their anſweres by oath concerning ſuch *chattels* & *debtes* in demaund, confirmed by faith or oath giuen; or of witneſſes being not willing to depoſe in thoſe cauſes, or of all theſe three: it is aſſured, that he, who findeth himſelfe grieued thereby, wilbe vnwilling: and that albeit the pretence of ſuch *Ordinarie* be to puniſh the ſinne onely; yet hereby (*per obliquum*) the coniſance of *lay contractes* wilbe drawen to *eccleſ.* courtes, and ſo the Kings courtes (vnto which they properly belong) ſhall thereby be encroched vpon, & preiudiced. But this cannot be truely ſaid, touching matters of meere *eccleſiaſtical* coniſance, being neither *teſtamentarie*, nor *matrimoniall*; though *lay* men be vrged by courtes *eccleſ.* to anſwere or *teſtifie* in them vpon their *oathes*.

[1] Pro huiuſmodi rebus (per vices) trahitis coram vobis. Prohibition in Raſtall, vbi ſupra.

Beſides, what damage cõmeth to the cauſe nowe by vs defended; if we ſay, that the abſurdities following vpõ ſuch their interpretatiõ being not afore wel weyed, & he out of whoſe copy the *Regiſter* was printed, vnderſtãding it as they doe; was content to adde thoſe two clauſes, for an explanatiõ of the ſaid writs, according to his owne meaning; or that he was willing they ſhould ſo be vnderſtood? which perhaps enduced him to make ſuch a briefe abridgement, of ſo long a writ. For it doeth not appeare, that before the imprinting, it was peruſed & allowed by any the *Iudges* then being; or by any others, deputed by publike authoritie, for the reuiewing and correcting of it. No doubt if it had bin (that I ſpeake of nothing elſe) ſo many groſſe errors in the Latin both againſt cõgruity & al ſenſe, as in every leafe (almoſt) of the copie which the Printer followed, are to be found; could not haue ſo eſcaped, without cõtrolement and amendment. But the former

wordes

wordes ſet downe by *Raſtall* at large in the writ in ſelfe (where neither of theſe laſt recited clauſes are to be found) are too cleare in this point, to be dimmed by any ſuch light colours. But if hereupon it be perhaps graũted (as the authour of the *Treatiſe* doth) that *witneſſes* may take *oath* & depoſe willingly, in other *eccleſiaſticall* cauſes, at the requeſt of ſome of the parties: I muſt then call to their minde, that I haue ſhewed afore, that (following their owne interpretation) they may not, though they be willing. Yea though witneſſes might, if they were willing; how can a reaſonable man entend, that the *partie* to be ſued, will come in at all, but much leſſe anſwere, if he may not be cõpelled vnto neither: viz. *neq; ad recognitionem faciendã, neq; præſtandũ ſacramentũ:* as *Fitzherbert* (in his *natura breuiũ*) alſo doeth vnderſtand and reade it. And the wordes reach vnto all *lay* perſons, not diſtinguiſhing a *partie* from a *witneſſe*.

Againe, by that their interpretation of *recognition* & *oath*, they could neuer haue ſuch witneſſes that be indifferent, as in part is afore touched. For if witneſſes may not be vrged to ſweare or to anſwere further then they liſt themſelues; then will they onely anſwere to the matters propounded by him who produceth them, and wil refuſe to anſwere the *Interrogatories* propounded by the other *partie* for his defence, by whom they were not requeſted to come. Which courſe (vpon the matter) taking away all teſtimonie, that ought to be indifferent for either *partie*, in ſuch pertinent matters as are to be demaunded; is contrary to the lawe of *God*, of *nature*, of *nations*, and to the very qualitie of a *witneſſe*. *Decius* ſaith:[1] *Si teſtis depoſuit pro vna parte, & interrogatus pro alia noluerit reſpõdere, illis fides adhiberi non debet; quia præſumitur ſupprimere veritatem.* And ſo the courſe being moſt vnreaſonable, that whereupon it followeth, muſt needes be alſo very abſurde, and againſt Iuſtice. By all which premiſed diſcourſe, it is made (I hope) manifeſt, whether *Fitzherbert* had good ground out of that fourme of *Prohibition* and *Attachement* to [2] gather; not onely *that Ordinaries muſt expreſſe a particular cauſe in all their Citations;* but alſo, that *if they expreſſe any cauſe at all in the Citation, that (it ſeemeth by that writte) it muſt bee a cauſe matrimoniall or teſtamentarie*. For ſeeing they haue none other meanes beſides *Citations* to ſummon men to their Courtes:

[1] Decius in l. 2. C. de edendo. nu. 43.

[2] Nou. nat. breu. fol. 41. litera a.

What

What is this latter collection (built but vpon a doubtfull ſeeming) elſe then an aſſeueration implied; that none other of the cauſes (afore) proued to be of *eccleſiaſticall* coniſance; ſhall euer be dealt in, by any court *eccleſiaſticall?* and ſo (vpon the matter) in no court at all; for that *temporall* courts be out of *iuriſdiction* in thoſe matters. Which howe it may be defended from groſſe abſurditie, I would gladly learne from any, that patroniſeth this opinion. But if the lawe were ſo in deede, that none ſhould be called into *eccleſiaſticall* courts, but for thoſe two cauſes: I marueile what the *Preſbyteries* (ſo much doted after eſpecially by ſundry fauourers of this interpretation) would doe here in this Realme, when their *Cõſiſtorial* power ſhould be ſo lopped, that they could not call any man before them, but either in *teſtamentarie* cauſes (which they make in other mens dealings to be meere *Ciuil* cauſes) or *matrimoniall*, many of which alſo they now ſeeme willing to abandõ, as *temporall* matters? for they ſhould be driuen, either to be kings of molehils; or elſe to preache in the moſt vehement veine they haue, againſt that lawe and thoſe magiſtrates, which (in ſuch ſort) would reſtraine them: as if they were both *Antichriſtian*, at leaſt for hindering and ſo impounding of the pretended gouernement of *Chriſt*: that thereby they might at length be ſet at libertie, to deale in their *Conſiſtories* againſt all *crimes* whatſoeuer, according to their owne platfourmes. Yet herein they ſhould deale very vnequally; becauſe they will not nowe ſuffer that, vnder this gouernment; which themſelues would practice againſt *crimes* in a farre more ample, and peremptory maner, then either nowe is done, or were meete to be ſuffered.

In the bookes of the *Common* lawe I finde alſo ſome caſes, that giue ſtrength to this interpretation. For *an* [1] *Attachement vpon a Prohibition was ſued, becauſe they ſued in a ſpirituall Court for haye and money, which touched neither matrimonie nor teſtament: and after vpon ſhewing the Libell, which prooued that it was for tithes and oblations, a conſultation was graunted.*

[1] M.44.E.3. fol.32.

Likewiſe [2] *a Prohibition was ſued foorth of the Chauncery (directed to the Iuſtices of the common Pleas) to make an Attachement, becauſe the defendant had ſued the plaintiffe in the ſpiritual court for debt, which did not touch matter of matrimonie nor teſtament, whereof the coniſance belongs to the Kings Court: and thereupon a prohi-*

[2] M.38.H.6. fol.14.

bition

bition was granted thence. Wherein it is woorth the noting, that *Fitzherbert* (in his [1] Abridgement) leaueth out theſe words (*for debt*) contrary to the booke it ſelfe at large, and alſo [2] to *Brooke*: I will not ſay it was to giue colour to his opinion in his *Natura brevium*, as if he ment to haue it ſound, that no matter at all, but either *matrimoniall* or *teſtamentarie*, might be ſued in court ſpirituall, whereas by theſe two reports it may appeare, that *Prohibitions* did not lie in this reſpect for that the parties were ſued and called into the eccleſiaſtical court againſt their wils in any other cauſe whatſoeuer then thoſe two: but onely, for ſuing there *for chattels & debt*, which did touch neither *matrimony nor teſtament*. Whereof may bee gathered, that euer ſince the firſt framing of this writ, either none in this point hath knowen the lawe, vntill *Fitzherbert* (for *nõ eſt inſtandum in propoſito:*) or elſe thoſe words doe carie another meaning then is now fathered vpon thē: which that they doe both in the affirmatiue for ours, & negatiue againſt theirs (I hope) is ſomewhat plainely prooued. And therefore we may conclude, that theſe two laſt opinions, *the one for not citing* any perſon, in any other cauſe then theſe two: the other for *not citing laie men, & for not vrging them to take oath, in any other cauſe eccleſiaſticall whatſoeuer, but either teſtamentarie or matrimoniall*, are voyd of all ground of law: nay are contrary to Statute lawe, to Common lawe, to practiſe for time immemoriall, and alſo vnto reaſon in ſome ſort.

[1] Fitzh. Prohibition, nu. 5.
[2] Brooke. Prohibition, nu. 6.

CHAP. XIII.

That iudgement of hereſie ſtill remaineth (at the Common law) in Iudges eccleſiaſticall: and that the Proviſo touching hereſie, in the Statute, 1. Eliz. cap. 1. is onely ſpoken of eccleſiaſtical Commiſſioners thereby authorized.

THe two other opinions remaining, that reſpect matters, handled by Eccleſiaſticall iuriſdiction (and come next to be treated of) for the affinitie of them, and becauſe they both depend vpon one and the ſelfe ſame grounds, I purpoſe (brieflie) to handle together: viz. *whether the iudgement of Hereſie nowe lieth rather in the Common lawe, then*

Eccleſiaſticall: and *whether nothing may at this day be adiudged hereſie, but according to the ſtatute* primo *of her Maieſties reigne:* For in the true vnderſtanding of that ſtatute, the deciſion of theſe two opinions will wholie reſt. It ſeemeth by the latter, the author of them thinketh, that before the ſtatute, 2. H. 4. Ordinaries at the Common law might not by their iuriſdiction Eccleſiaſtical, proceed to the condemnation of an heretike: and therefore (ſeeing all former ſtatutes made againſt heretikes, ſtand now repealed) he gathereth; that no heretike may be delt with, but according to the ſaid ſtatute, made in the firſt yeere of *her Maieſties* reigne.

[1] 1. Eliz. cap. 1.

This opinion (it may be) he gathered out [2] of *Fitzherbert* his *Noua natura brevium:* yet I thinke rather, it was his owne conceit, both becauſe he doeth not alleage *Fitzherbert* for it; and for that *Fitzh.* leaueth (euen at the *Common* lawe) authoritie in the whole Conuocation of a *Prouince*, to condemne an heretike, albeit he there alſo hold, that (at the *Common* lawe before ſuch ſtatute) a *Biſhop* in his diœceſſe, could not ſo condemne. But I haue ſhewed in the twelfth chapter hereof, by very great and good opinion, the law in this point to be miſtaken. For proofe that it is ſo, I alſo touched it ſomething in the 8. chapter.

[2] Fitzh. in noua nat. br. fol. 269. D

For in the *Preamble* of the ſtatute it is thus conteined: *The diœceſſans of the realme then complained, that they could not by their iuriſdiction ſpirituall (without aide of the roiall Maieſtie)* what? not at all? Nay, but not *ſufficiently correct, nor reſtraine the malice of heretikes:* Why? becauſe they wanted authoritie at all to deale with them? No, but *becauſe the heretikes goe from diœceſſe to diœceſſe, and will not appeare before the diœceſſans, but contemne the keies of the Church, and cenſures of the ſame.* So that, had it not bene for their *fugitiueneſſe*, their *refuſing* to appeare, and *contempt* of the keies; the *ordinarie diœceſſans* had *Iuriſdiction ſpiritual*, to correct and reſtraine them. In which reſpect, and for better aſſiſtance of their former iuriſdiction, it was then firſt prouided, that heretikes ſhould be attached and impriſoned. Other authorities out of Statutes, I there (in the eight Chapter) alleaged alſo to this purpoſe.

[3] 2. H. 4. cap. 15.

The wordes of the Statute made *primo* of her [4] *Maieſtie* (from which this ſecond opinion is gathered) doe make the matter cleere; that nothing thereby is meant, but that *Commiſſioners for*

[4] 1. Eliz. cap. 1.

cauſes

cauſes eccleſiaſticall, according to that Act (termed by the common people the *high Commiſſion*) *ſhal not haue authoritie to adiudge any matter or cauſe to be hereſie, but onely ſuch, as hath bene ſo adiudged, by the authoritie of the Canonicall Scriptures, or by the firſt foure generall Councels, or by any other generall Councell; wherein the ſame was declared Hereſie, by the expreſſe and playne wordes of the Canonicall Scriptures.* So that the iuriſdiction of *Ordinaries*, and of the *Conuocation*, ſtill remaineth as it did afore at the *Common* lawe.

But I muſe greatly what colour or pretence he could haue, to gather the firſt of theſe two opinions out of the aforeſayd words: for doeth he or can he thinke, that the ordering, determining or adiudging of a matter to be *Hereſie* by the *Commiſſioners eccleſiaſticall* (there ſpoken of) is a iudgement at, or according to the courſe of the *Common* lawe, as the *Common* law is taken in vſuall ſignification? Or ſhall it be imagined, that whereſoeuer any matter by occaſion comes in to bee mentioned in a ſtatute (as for 'example, naming matters of *faith*, mentioning *errors* in doctrine, or the *doctrine* of the Sacraments) that the determination of all ſuch points, and what and how many ſpeciall matters, are conteined vnder thoſe generall heads whatſoeuer; ſhall (by reaſon of ſuch incident mentioning of them in a ſtatute) be put ouer to the iudgement of a *Iurie*, or to the determination of *Temporall Iudges*? What other may conceiue, I know not; for my part, I muſt take it (till I be better informed) to be ſo ſimple a conceit, as is worthie rather to be diſmiſſed with laughter, then to be confuted with further reaſon. 'I 13. Eliz. c. 12.

CHAP. XIIII.

That by the Statute her Maieſtie may commit authoritie, and naturall borne ſubiects may take and vſe in Eccleſiaſticall cauſes, attachments, impriſonments, and fines.



He next *opinion* that comes to be treated on, is: Whether *the Queens Maieſtie by her letters patents vnder the great ſeale of England, may authoriſe the vſe of any other proceſſe in matters eccleſiaſticall, then by citation*, as by letters *miſſiue*, *attachment*, or ſuch like? whereunto I adde the

other two of the ſame author,& depending vpō the ſame ſtring: *whether her highneſſe may ſo authoriſe the vſe (in matters eccleſiaſtical) of any other coërtion or puniſhmēt*,as by *fine* or *impriſonment?* Theſe opinions if they be not well grounded vpon lawe, ſeeme to me to touch her *Maieſties* prerogatiue roiall,and ſupreme gouernment (that was yeelded vnto her highneſſe by ſtatute) very deeplie ;whoſoeuer be *Author* of them.

And if this authoritie that is hereby impugned,be (in trueth) a *preheminence* vnited and annexed to the *Imperiall crowne* of this realme,by *Parliament:* and if he be a man of any qualitie,(ſo that hee hath taken the oath of *Obedience)* let him vſe good aduiſement,how it may ſtand with ſuch his oath and allegeance. They are pretended both by the *Treatiſer* and the *Note-gatherer* to be grounded vpon [1] theſe words of *Magna charta*,viz. *No free man ſhall be taken or impriſoned, or be diſſeiſed of his free hold or liberties, or free cuſtomes, or be outlawed, or exiled, or any otherwiſe deſtroyed, nor we ſhal not paſſe vpon him nor condemne him,but by lawfull iudgement of his peeres,or by the lawe of the land.* Whereupon the *Note-gatherer* alſo doeth collect, that none may be *attached*, but ſuch as be firſt endited. But the end why this law was made, and the time when it was made, are needfull to be conſidered. The ende was this,that the *Kings* of this realme ſhould not chalenge an infinite and an abſolute power to themſelues,(as ſome kings elſewhere did, & yet do) without iudgement & lawful proceeding, to take away any mans *liberti*e,*life*,*countrey*,*goods* or *lands*.

[1] Magna charta, cap.29.

And it was at ſuch time when the kings themſelues thought, that *Iuriſdiction eccleſiaſticall*, was not (in right) no more then it was in fact at that time belonging to the crowne : therefore in that it is here ſayd, *Wee will not paſſe vpon him, nor condemne him, but by lawfull iudgement of his peeres,or by the lawe of the land*; it is manifeſt, that the wordes haue no relation to *Iuriſdiction eccleſiaſticall:* for that which was done by that *Iuriſdiction*, was not (at that time) taken to be done by the *King* or by his authoritie: and the lawes that *eccleſiaſticall* Iudges practiſed; were not then holden to be the *Lawes of the Land*, or the *Kings* lawes; as (ſince the lawfull reſtitution of the ancient right in that behalfe to the crowne) they be often called, *The* [2] *Kings or the Queenes eccleſiaſticall Lawes.*

[2] 1. Eliz. cap.2. & paſſ. alibi.

In

In the *Preamble* [1] of a ſtatute made in king *Henrie* the eights time, it is to this effect ſaid: that *the people of this Realme, haue bound themſelues by long vſe and cuſtome, to the obſeruance of certeine mans lawes (beſides thoſe which were ordeined in this Realme) not as to the obſeruance of the lawes of any forren Prince, Potentate, or Prelate: but as to the accuſtomed & ancient lawes of this Realme, originally eſtabliſhed as lawes of the ſame, by the ſufferance of Kings, and by conſent and cuſtome of the people, and none otherwiſe.* And a litle after, mention is there made, of *ſuch lawes humane, induced into this Realme; by the ſaid ſufferance, conſents, and cuſtome.* This is brought to prooue; that *the Parliament or ſuch as it ſhall authorize, may diſpenſe with thoſe, and with all other humane lawes of this Realme:* for ſo they be termed. Whereupon, in the body of the ſtatute, enſued that authoritie, which the *Archbiſhops of Canturburie* haue, of granting *faculties*, &c. And therefore the *humane lawes* (ſpoken of in the *Preamble*) are thoſe *Canon* lawes; which by *ſuch ſufferance, vſe, and cuſtome* are (now) *as the accuſtomed and ancient lawes of this Realme, originally eſtabliſhed as lawes of the ſame:* howbeit by the meanes aforeſaid, but *induced into the Realme*, and not here at firſt *made nor ordeined.*

[1] 25.H.8.ca.21.

There is [2] another ſtatute alſo, made in her Maieſties time; in the *Preamble* whereof, they be called *the Eccleſiaſticall lawes of this Realme.* So that when whole *Parliaments* do aduow them to be *lawes of the Realme*, yea & that for proofe of another point perhaps doutfull: we may then well make but light account of all the *Treatiſers* exclamations to the contrary, who calleth thē *ſtrange lawes and forren lawes &c:* ſo long as we meane but of ſuch *Canons*, as *haue bene of long time vſed, and be* [3] *not to the damage or hurt of the Queenes Maieſties prerogatiue royall, nor contrariant or repugnant to the lawes, ſtatutes, and cuſtomes of the Realme.*

[2] 5.Eliz.cap.15.

[3] 25.H.8.ca.19.

Furthermore, it is well and notoriouſly knowen, that proceedings and condemnations Eccleſiaſticall in ordinarie Courts were neuer made by *the iudgement of a mans peeres, viz.* by a *Iurie:* and therefore thoſe words rehearſed, can not be ſo farre extended, as to include that *iuriſdiction.* Yet as *inſtitution* vnto a benefice, both before & after *Magna charta*, belonged alwayes to *eccleſiaſticall* perſons and *iuriſdiction*; ſo did alſo the *deſtitution*

or *deprination* from a benefice by the *Common* law: in which reſpect, *Biſhops* (that claime not the patronage) do alwayes plead to a *Quare impedit*, thus; *Nihil clamat prater inſtitutionem & deſtitutionem Clericorum, vt Ordinarius in dicta rectoria de A. &c.* whereby may appeare, that a man might (by law) be put out of his benefice (being his freeholde) otherwiſe then according to the forme of that ſtatute. And this (by the way) may alſo ſhew, how vnſound a collection the *Note-gatherer* maketh, out of thoſe words of *Magna Charta*; where, becauſe *a benefice is a freeholde*, he would inferre that a *Clerke* may not be depriued of his benefice, but by a iudgement at the *Common* law.

I haue alſo proued in the chapter next afore, and in the eight, and the twelft chapters; that an *Ordinarie* in his *diœceſſe* (euen at the *Common* law) might condemne a man for *hereſie*; whereupon (after committing to the ſecular power) ſuch an *heretike* was put to death, by burning: but this was not done by any *iudgement of his peeres*, and therfore thoſe words of *Magna Charta*, are no way to be conſtrued of any *iuriſdiction eccleſiaſticall*.

Furthermore, beſides *iudgement of a mans peeres*, there is added, *or by the law of the land*; which permitteth other triall then by *Peeres*: as by *battell*, &c.

Now ſeeing all iuriſdiction and authoritie in this Realme, aſwell *eccleſiaſticall* as *temporall*, was euer in *right*, but now is alſo (iuſtly) acknowledged, and is *in fact*, vnited and incorporated vnto the *crowne* of this Realme: therefore inquire, whether vpon the premiſes it may not be probably ſaid (albeit not according to the vſuall ſpeech) that a iudgement duely giuen by the *iuriſdiction eccleſiaſticall*, is giuen *by the law of the land*? But this cloud, or rather miſt, which they would caſt, is alſo plainely diſperſed by the firſt chapter in *Magna Charta*: for thereby is made a flat diſtinction and ſeuerance, betwixt the *grant there made to God*, (with *confirmation of the Church of Englands freedome, rights, and liberties for euermore*) from thoſe *grants* that are after made, to other the *freemen of the whole Realme*, in the reſt of that *charter*: ſo that the *iuriſdiction* of the Church, can not be intended to be meant in any of all the reſt, except it be particularly expreſſed. Yet if thoſe words were admitted to be meant and ſtretched foorth vnto that *iuriſdiction* alſo, will not ſtatutes made by the

like

like authoritie of *Parliament*, ſufficiently qualifie or impeach thē?

Vnto this head, is that obiection of the *Note-gatherer* to be referred, where he allegeth out of the *diary acts* of the Clerke of the *Parliament*, I know not how truly,[1] that *the Commons exhibited a petition, that Lollards arreſted by the ſtatute of 2. H. 4. ſhould be bailed, and that none ſhould arreſt, but the ſhiriffe or other lawfull officers.* But he doth fully anſwere himſelfe therein: for the *kings* anſwere was (ſaith he) that *Le roy s' aduiſera*; which is the forme of diſſent, that the *Kings* and *ſouereigne Queenes* of this Realme do vſe, when they diſſent or deny any ſtatute or petition in *Parliament* offered vnto them to be confirmed for a law. Whereby we ſee, that arreſts & attaching for crimes might be made without *enditement* precedent; and by others then the *ſhriffe* &c; and alſo, that albeit *Magna Charta* had bene to the contrary, yet an act of *Parliament* comming after, might change that law. Wherof if need were I could ſhew ſundry other examples: notwithſtanding, that which the *Treatiſer* putteth vs in minde of, *viz.* that *in K. H. 3. time, there was a iuſt ſentence of curſe and anathematization, denounced by the Biſhops, againſt the violaters or breakers of the ſaid great Charter.* But what if *Biſhops* ſhould vſe the like authority now, to *excommunicate* indefinitely and aforehand, all ſuch as ſhall hereafter breake ſome *temporall* law? it is to be doubted, that the *Treatiſer* would not in this caſe be the ſame man, nor yet affirme it to be a *iuſt ſentence*; but would rather threaten them with a *Præmunire*, for their kindneſſe.

[1] 4. H. 4. art. 19.

It is aſſured, that *par in parem non habet imperium*: and none authority can ſo binde it ſelfe by any law; but that (vpon good occaſion and by like power) it may be abrogated againe. Yet how litle this plea of ours is needfull in this caſe is ſufficiently ſhewed. Yea rather the defenders of theſe & ſuch like opinions againſt the rights and liberties of the Church of *England* notoriouſly knowen ſo to be, by the reported lawes & cuſtomes thereof, to them that know any thing in either: had need more iuſtly to feare that *cenſure* of the *Biſhops*, if it be ſo *iuſt*; if ſo be they cary any feare at all or reuerence vnto the *cenſures* of the Church, which be ſo *iuſtly* inflicted, as themſelues do yeeld.

As theſe opinions do onely reach and ſhoot at the *commiſſion eccleſiaſticall*, to impound and ſtreine the authority thereof vnto

ſo

ſo narrow a roome; as that her Maieſtie ſhould thereby haue no ſeruice done by thoſe her ſubiects which are imployed therein; wherby the fanſies of the fauorites of theſe men, might more freely growe without diſcouery, or any ſuch penaltie as they thinke they need care for: ſo for the iuſt defence (herein) of that *commiſſion*, I may allege the words of the ſame ſtatute, whereby it is eſtabliſhed; [1] *viz. They ſhall haue full power and authoritie, by vertue of this act, and of the ſaid letters patents, vnder your highneſſe, your heires or ſucceſſors, to exerciſe, vſe and execute all the premiſſes, according to the tenour and effect of the ſaid letters patents, any matter or cauſe to the contrary, in any wiſe notwithſtanding.* By which words, *tenor literarum*, is ſignified whatſoeuer *tenent in ſe, viz.* that which is expreſly conteined in them: by the *effect of them* is vnderſtood, whatſoeuer is within the true and vnforced meaning, of any ſuch letters patents. So that if *attachment, fine, impriſonment*, &c. be either in the letters patents expreſly conteined (as in trueth they be) or vndoubtedly meant by them; then the vſe and exercciſe of theſe, ſhall thereby ſufficiently be warranted and authorized vnto her Maieſty for granting; and to the commiſſioners, for ſo executing. And if any doubt (otherwiſe) might be made, yet there be two clauſes in the words aforeſaid, that be called *verba ſine clauſula operatiua:* and do therefore ſupply many defects and wants in the exerciſe of a *iuriſdiction*, delegated by the Princes *reſcript*. The firſt of them are thoſe words, *Full power & authoritie:* and the other is, the generall *non obſtante, in tranſcendenti, viz.* of *any matter or cauſe* whatſoeuer.

[1] 1. Eliz. cap. 1.

But to all this is anſwered by ſome, that theſe words, *viz. according to the tenour and effect of the ſaid letters patents*, do worke thus much: that her *Maieſtie* need not grant *all*, but *ſo much* iuriſdiction, as her Highneſſe thinketh meet: and that ſo many or few of them (ſo they be two at leaſt) may thereby be authorized vnder *her Maieſtie*, to exerciſe ſuch *iuriſdiction*. It is true, that thoſe words ſo worke and import ſo much: but doeth it heereof follow, that nothing elſe is meant or can be comprehended thereby? Nothing (ſay they:) for other proceſſe then *citation*, or other cenſures or puniſhment then *excommunication*, &c. *her Maieſtie* can not commit vnto them: elſe *might ſhe alſo giue them authoritie to hang men.* What? is there no more

difference

difference with theſe men, betwixt attaching, fining or impriſoning, and plaine hanging? What will they then ſay of the *Starre Chamber*, which may impoſe all thoſe three, and yet cannot put any man to loſſe of limme or of life? and this is great reaſon. For we are taught by the *Ciuill* lawe, (and I thinke it is agreeable alſo to the lawes of the land) that whereſoeuer an authoritie is giuen (in neuer ſo generall or pregnant wordes) it cannot be drawen foorth to reach vnto any mutilation of limme, or paines *capitall*, except they be plainely expreſſed.

Other ſome, as the *Treatiſour*, doeth anſwere this obiection in this ſort: but yet to the ende of prouing *othes of the parties, in cauſes criminall* to be vnlawfull, a matter to be handled in the thirde part, viz. *that how generall ſoeuer the words of the acte be in one place, yet are they to be reſtrained to this particular, viz. none other then ſuch iuriſdiction eccleſiaſticall, as may be lawfully vſed:* and entending (*per petitionem principij*) that ſuch *oathes*, be contrary to law. But in this his interpretation (he ſaith) he contrarieth *diuerſe great learned men* in that lawe, *whom it behoueth with a more narrowe eye to beholde this ſtatute lawe.*

Truely halfe an eye of a meane learned man, will ſerue to diſcouer, that he cautelouſly leaueth out one member of the *diſiunctiue alternation*, which is in that ſtatute. For it is thus, viz. *all Iuriſdictions &c. whatſoeuer, by any Spirituall or Eccleſiaſticall power or authoritie, hath heretofore bene, or may lawfully be exerciſed, &c.* So that if either it *haue bene* exerciſed at any time, or hauing not bene put in exerciſe, yet *lawfully may be*; it is here graunted to *her Maieſtie*. And were it in deede meete either in *temporall* or *ſpirituall Iuriſdictiõ*, to leaue it to the diſpute & determinatiõ of euery priuate ſubiect that is dealt with; what may be *lawfully*, and what may not ſo be done, in either lawe?

The *Treatiſour*, nor any other, cannot in anſwere hereof, ſay: that the worde *lawfully*, muſt alſo be vnderſtood as repeated in the firſt member. Firſt becauſe it is a *diſiunctiue propoſition*; and therefore that word ſhould haue bin expreſſed in the firſt part, if it had bin to be drawen vnto both; and not to haue bin put in the ſecond part onely. Secondly, for that it would then take away from *her Maieſtie* all ſuch *eccleſiaſticall* authoritie (being moſt lawfully in her *Highneſſe*) as was *heretofore exerciſed* by, or

vnder the *Pope*, by *vsurpation*; and therefore moſt vnlawfully. Neuertheleſſe the matters graunted and exerciſed by the *commiſſion*, which are by him chalenged; (I truſt, God willing) ſhall be alſo otherwiſe prooued *lawfull* and warrantable. Againſt *impriſoning* by vertue of the *commiſſion* (one of the ſpeciall matters nowe in handling) the ſaid *Treatiſour* obiecteth: that, *ſuch parties as refuſe to ſweare to anſwere the articles exhibited againſt them, are impriſoned without baile or maineprize: whereas by the lawe eccleſiaſticall, they ought not to be impriſoned, but to be proceeded againſt, as pro confeſſis.*

It is true, that by *Ordinary* authoritie *eccleſiaſticall*, no man may be impriſoned. Therefore the vntying of this knot, reſteth vpon the whole matter here diſputed of, viz. whether that ſtatute *10. Eliz.* doe not warrant *her Maieſtie*, to graunt by her Highnes letters patents, power to impriſon, for ſuch *contempt*, as this obiection importeth.

To prooue that *her Maieſtie* may not ſo graunt, nor they take ſuch authoritie: the *Note-gatherer* affirmeth, that *the commiſſion bindeth them preciſely to crimes puniſhable by the eccleſiaſticall lawe; and to proceede according to the eccleſiaſticall lawes of this Realme, and not according to the temporall:* quoting fiue ſtatutes for this, albeit there be in none of them any ſuch matter. but both the firſt and ſecond part of this obiection, is vntrue. For the *commiſſion* (though nowe that power be not altogether vſed) graunteth the execution of foure ſtatutes vnto them, and alloweth them to proceede aſwell by *Iuries*, as by courſe of the lawe *eccleſiaſticall*. And when *Doctor Grindall* was *Biſhop* of *London*, ſundry crimes *eccleſiaſticall* (by vertue of the *commiſſion*) were tried by *Iuries*, before him and certaine *Iudges*, and other profeſſours alſo of the *common* lawe; being then in that *commiſſion*. Yet is the *Note-gatherer*; vpon this vntrue ground bold to inferre, that to doe otherwiſe, is *to encroche vpon the temporall iuriſdiction: and to make an hotchepot in one commiſſion*. Truely this his collection is not worth an *hotchepot*, that is a *pudding*, as *Littleton* doeth expound that worde. For the *temporall Iudges* are not to proceede in matters of *eccleſiaſticall iuriſdiction:* and therefore their *iuriſdiction* is not *encroched* vpon, though in ſuch matters *eccleſiaſticall* attachements or impriſonments be vſed, or fines impoſed; ſeeing

ing they themſelues cannot (in thoſe cauſes) vſe or impoſe them.

When the whole Realme at the beginning of *her Maieſties* reigne was viſited (by vertue of this ſtatute) by *Diuines, Ciuilians*, and *Common Lawiers* in that ſeruice imploied; who had authority by their ſeuerall *cõmiſſions* to attache, impriſon, fine, &c. aſwell as to vſe *cenſures eccleſiaſticall*; al which they did accordingly: then and at that time, none of theſe quicke *& narrow ſighted* fellowes (lately ſprung vp) were to be found; that could ſee more then the reuerend Iudges, and could ſo roundly tel *her Maieſtie*, that ſhe did graunt more authoritie to her *Commiſſioners*, then by that ſtatute was giuen to her ſelfe. Oh, belike it was *lawe* then, and good *iuſtice* againſt *Papiſtes:* but to deale againſt pretended *Reformatiſts*, it commeth farre too ſhort.

But the *Treatiſour* vrgeth this matter yet further: he ſaith, that *no learned man wil affirme, any Iuriſdiction (by that acte 1 0. Eliz.) to be vnited to the crowne, but ſpirituall or eccleſiaſticall.* And that none ſuch can affirme, that *any iuriſdictiõ &c. repugnant or offenſiue to the Common or Ciuill Policie of this Kingdome, is eſtabliſhed by that Acte: for that there is none Antinomy or contrarietie of lawes.* Whereupon he woulde inferre, that *Attaching, Impriſonning*, and *Fining &c.* (by vertue thereof) is not warranted to be graunted.

In anſwere whereof, let him vnderſtand, that his *argument* followeth not vpon either of thoſe *Antecedents.* For the firſt, though the *matters* of *iuriſdiction* thereby vnited to the crowne, be onely *eccleſiaſticall*: yet the *maner* of *conuenting*, or *puniſhing* in them, is not in that *Acte* ſo reſtrained, but that ſuch other courſes may be vſed, as to *her Maieſties* wiſedome ſhall ſeeme moſt fitte: which by and by ſhalbe ſhewed God willing. For the ſecond: we deny the maner of *conuenting* and *puniſhing* eſtabliſhed by the *commiſſion, to be repugnant or offenſiue any way to the Ciuill Policie of this kingdome:* for it is warranted by that *Acte.*

This point (if the wordes of that whole clauſe be aduiſedly weyed and conſidered) will be made moſt plaine. In the exerciſe of a *criminall iuriſdiction*, there is the *matter*, wherein it is beſtowed, the *maner* of conuenting, and *ſanction* or penaltie to be inflicted vpon offenders, which are to be conſidered. Now the *matter* of this *iuriſdiction* and authoritie graunted to *her Highnes*,

and that may be assigned ouer by *her Maiestie* vnto *Commissioners, to visiting, reforming, redressing, ordering, correcting, and amending all such errours, heresies, schismes, abuses, offences, contemptes and enormities whatsoeuer, which by any spirituall, &c.* Yet what course is to be holden in *calling and conuenting*, and what kind of *penalties or censures* shalbe inflicted vpon offenders by that authoritie; are by no wordes of that acte expresly graunted to *her Highnes*, or mentioned, that they may be assigned by her vnto the *Commissioners*; and therefore of necessitie to be supplied by those generall wordes, viz. *According to the tenour and effect of the letters patentes.* For els (by such an interpretation of theirs) we should haue matters for a *Iurisdiction*, but neither any *maner* to *conuent* and compell to come afore the *Commissioners*; nor yet *punishment* to lay vpon enormious offendours, against whom it was intended. Which, because it is very vnreasonable; therefore that opinion, whereupon it necessarily followeth, must needes be more absurd, and without ground of reason.

Yea (say other of them) be this as it may; and let them seeke out what processes, &c. may and shall be vsed by the *Commission Ecclesiasticall*: for it is contrary to the lawe, to graunt (by *Commission*) authoritie to inflict any punishment vpon a fault, which (by lawe) ought not to be inflicted: and therefore they gather that the *Queene* cannot authorise, nor any man may take power to *attache*, to *fine*, or to *imprison* men, by that *Commission*. Thus farre it is true, that a *Cõmission* may not be graunted to alter or change any lawe in force: but I trust it is not contrary to the *Common* lawe and custome of the Realme, by acte of *Parliament*, to alter and change that which stoode otherwise afore, at the *Common* lawe.

If this so did by the course of the *Common* lawe, no man may be put to the racke or torture (especially about felonies or murders) thereby to drawe him to confesse of himselfe, or of other men, his complices: Yet is it notorious, that in *Wales* and the *Marches* thereof, the *President* and *Counsaile* there established, doe vse, and lawfully may put men to such torture; by warrant of instructions onely sent vnto them from time to time, vnder *her Maiesties* gratious hand.

[a] 32. H. 8. ca. 28. Rastall, Walcs 32.

This their authoritie (I take it) is deriued from these [a] wordes in an

in an *Acte of Parliament: The Preſident and Counſaile there, ſhall haue power and authoritie, to heare and determine, by their wiſdomes and diſcretions, ſuch cauſes and matters, as be or hereafter ſhall bee aſſigned to them by the Kings Maieſtie, as heretofore hath bene accuſtomed and vſed.* Which doe conteine no more particularitie of authoritie, nor yet are of ſo much pregnancie to that purpoſe; as the wordes (that eſtabliſh the *Commiſſion Eccleſiaſticall*) be, for *Attachment, fine*, and *impriſonment* to be vſed, if it ſhall pleaſe her *Maieſtie* ſo to commit them.

The deuiſe of the *Commiſſion Eccleſiaſticall*, was for aſſiſtance and ayde of *Ordinary Iuriſdiction Eccleſiaſticall*; and for rounder proceeding, and for more grieuous puniſhment at leaſt (in theſe diſſolute times) more feared; then can or may by *Ordinarie Iuriſdiction* be inflicted. Therefore, if by the general words of that Acte, *1. Elizabeth*, both theſe proceedings whereof wee here ſpeake, and many other particularities of *maner, perſons, times, places*, and other *circumſtances* might not be warranted: then the authoritie (there) giuen to *her Maieſtie*, were of none vſe at all, neither could it poſſibly be practiſed.

But I thinke this power here by theſe opinions impugned, may be alſo prooued directly, out of the words of the very Acte, thus: *whatſoeuer by any Spirituall or Eccleſiaſticall power or authoritie hath heretofore bene, or may lawfully bee exerciſed or vſed for viſitation, &c. or reformation, &c. of all maner errours, &c. and enormities whatſoeuer*, that is vnited to the *Crowne*, and by that Acte may be committed ouer by her *Maieſtie*: But *Attaching, impriſoning*, and ſuch like corporall coërtion, by ſome *Spirituall* or *Eccleſiaſticall* power or authoritie, hath heretofore lawfuly bene exerciſed: And therefore may be appointed by her *Maieſtie* to be now exerciſed by the *Commiſſioners Eccleſiaſticall*.

For proofe of the *Minor*, I am to put you in minde, what corporall puniſhments and chaſtiſements the ſuperiours of euery *Regular* perſon, as of *Monke, Frier*, and *Nunne*, might and did lawfully from time to time lay vpon them that were vnder their *Eccleſiaſticall* obedience; and yet (euen after their profeſſing) they remained ſtill the Kings ſubiects.

Likewiſe, when the ſtatutes againſt *Hereſies* were in force, theſe *Attachings, impriſonings*, and other *corporall chaſtiſements*

were then lawfully exerciſed and vſed by *Eccleſiaſticall* power and authoritie.

§ 1.H.7.ca.4. Laſtly,[1] *Biſhops and Ordinaries may lawfully at this day puniſh and chaſtiſe Prieſtes, Clearkes, and religious men within their Iuriſdiction, being conuicted of incontinencie, by committing them to warde and priſon, there to abide, for ſuch time as ſhall be thought to their diſcretions cõuenient, for the qualitie and quantitie of their treſpaſſe.* So that we may conclude, that *if any ſuch power haue bene vſed*, then her *Maieſtie may* (as it pleaſe her) vſe it ſtill; and appoint the ſame to be vſed by her Highneſſe *Commiſſioners*, howe and vpon whom, ſhe thinketh good.

The *Treatiſour* himſelfe teſtifieth, that *diuers euen of the learned ſort, do hold and affirme (and that very confidently) that the Acte and Commiſſion thereupon, doe giue full power and authoritie for any courſe ſoeuer, for the gouernment in cauſes Eccleſiaſticall, that ſhall be mentioned in the letters Patents.* This he exemplifieth by ſundry examples, though holden by ſuch *learned men*, which neuertheleſſe he accounteth contrary to Lawe: whereof ſome fall in moſt fitte for this place (becauſe they are bent againſt the ſaide *Commiſſion*) and others for other places of this *Apologie*.

Firſt he thinketh it very abſurde and not warrantable; that the *Commiſſioners Eccleſiaſticall ſhoulde commaunde Iuſtices of Peace, to aſſiſt any for attaching and impriſoning of offenders till they giue bonde for appearance.* And ſaith, this is *againſt Lawe and Iuſtice.* The onely reaſon he rendreth of this his aſſertion, is: for that *Iuſtices of Peace bee Magiſtrates, and Commiſſioners of Recorde, authoriſed, as well as the other.* Belike himſelfe is ſome *Iuſtice of peace: Hoc vrit hominem, qui imperare, non parêre didicit.*

And will he then (vpon his learning) deliuer; *That no Magiſtrate or Commiſſioner of Recorde, may be commaunded by another; though no leſſe be warranted by his Commiſſion?* Hereupon would follow, that *Iuſtices of Peace and Sherifs* might not be commanded in any caſe by the *Iudges of either Benche*, by the *Exchequer*, by the *Iuſtices of Aſſiſe*, by the *L. Treaſourer*, by the *L. Chauncellour* or *L. Keeper*; nor yet by the whole *Counſell boord.* He thinketh it alſo not iuſtifiable, that *any Magiſtrates ſhould be commanded by the Eccleſiaſticall Commiſſioners to aſſiſt in Attaching, or to attache*

attache any, vpon a warrant, called *Quorum nomina*. For reaſon of vnlawfulneſſe hereof, he alledgeth: *that no cauſe or matter is therein expreſſed or declared.* But this might be (*de facto*) omitted, in any other *warrant*, as well as in that. and yet is it vntrue, that *in this kinde of warrant, no cauſe is declared.* But admit it were otherwiſe; what Lawe of the *Realme* is againſt it? And if the like warrant ſhall come from the *Lords of the Counſell* to him, or any other *Iuſtice of the Peace*, to be ayding and aſſiſting vnto ſome *Meſſenger*, in attaching of certaine perſons to be caried vp vnto them as Priſoners, whom the ſaide *Meſſenger* ſhall name vnto them: will hee refuſe to intermeddle in the ſeruice as ſurmiſing *the Lords* to do therein againſt Lawe; becauſe they commaunde him being a *Iuſtice of Record*; and for that they ſignifie not by their *Warrant*, what the particular *cauſe* is, wherewith they minde to charge ſuch perſons that are to be *Attached?* But if in ſo doing their *Lordſhips* doe nothing contrary to Lawe, howſoeuer he doe fooliſhly and vndutifully to refuſe to giue his aſſiſtance: why ſhall the Lawe any more be againſt the *Commiſſioners*, doing but the like; and that by expreſſe *Warrant* of her *Maieſties* letters Patents?

Another reaſon, why ſuch *Warrant* ſhould not be iuſtifiable, he doth alledge: becauſe *the names of ſuch perſons to be Attached be not ſet downe by the Commiſſioners, but are referred ouer vnto others to ſet them downe.*

Mine anſwere hereunto is: Firſt, that the *Warrant* of *Quorum nomina*, is very rarely vſed by the *Commiſſion*, and the rarer, the better. Secondly, when it is vſed, the names of the *parties* are ſet downe and allowed (afore) by the *Commiſſioners*, and not by others, for any thing that I can learne. Neuertheleſſe there may be good and weightie occaſions, to omit this courſe: as when ſuch *Warrant* is directed to a man of qualitie and good credite, that he may put in the names; for this ende leſt when one is ſerued, he bewray all to the reſt, whoſe names be alſo in the ſame *Warrant*, that they may conuey themſelues out of the way. Howſoeuer it be in this behalfe, I thinke the *Treatiſour* will be long in finding out how this ſhould be reckoned, to be contrary to the Lawes of this *Realme*.

Hitherto

Hitherto touching the challenges made to ſome particular points, in the maner of exerciſing that *Commiſſion*.

But the *Note-gatherer*, (to cut off all theſe particular diſputes) alleadgeth; that *it may be thought, the whole Commiſſion is voyde in Lawe*. For that (as he ſurmiſeth) *it beareth date in July, but was ſigned in November next after*; [1] *contrary to a Statute*. What? was this quarrell which is now picked againſt it, worth the practiſe, of abuſing a *Counſellours* name, to procure a copie thereof? Well, both the *Preamble* and body of the ſtatute alſo doth cleare this cauill. For by the *Preamble* it appeareth; that the miſchiefe to be remedied was: *for that by grauntes antedated long before the King graunted them, other grauntees who (in very trueth) had the firſt graunt and great ſeale ſet to it, (yet bearing date truely)* were expelled by colour of letters Patents, bearing the elder date. In the *body* of the *Acte* is conteined this particle *Such*, which is of reſtraint, viz. *That the King (willing to put out ſuch ſlye deuiſes or imaginations)* did ordeine by *Parliament*; that *letters Patents ſhould be dated the day of their deliuery into the Chauncery; or elſe be voyde*. Now if this Statute were to be vnderſtood of all *letters Patents* whatſoeuer, where is the reaſon of that Lawe found in a *Commiſſion*? but, *ratio, eſt anima legis: & ceſſante ratione, ceſſat Lex*. Therefore this Statute can be ſtretched to none other *letters Patents* but *Such*, as the miſchiefe mentioned in the *Preamble*, may happen into.

[1] 18.H.6.cap. primo.

Yea, if it were otherwiſe to be vnderſtoode; he muſt (ere any will beleeue him) bring more euident matter then this: viz. *It is thought*, and *It may bee thought*. Let him then goe ſeeke the Records in the *Chauncery*; and ſee, whether the date and the day of the deliuery of it, doe not agree: and ſo may hee haue more colour to wreſt the ſtatute, when he doth not miſreport the matter *in facte*, as herein hee hath done.

CHAP.

CHAP. XV.

That an Eccleſiaſticall perſon may be deprined of his beneſice without enditement or proſecution of partie.

IN the next opinion, I minde to be very ſhort: it is this, *that by none eccleſiaſticall authoritie, a man may be deprined of his benefice (which is his freeholde) being not endited, and no ſuite of partie offered againſt him.* Whereby (we ſee) he requireth both an enditement, and a ſuite of ſome partie. It ſeemeth his meaning is, that a Miniſter cannot be depriued, but by way of *enditement* at the Common law, and that the Iudge (*of Office*) may not preferre ſuch *enditement*; but it muſt needs be at the ſute of a *partie*. I can not well coniecture, whereupon he pretendeth to ground this opinion. If vpon the 29 chapter of *Magna Charta*; it is ſhewed in the chapter next precedent, not to be vnderſtood of *Eccleſiaſticall iuriſdiction*, or of the practice thereof. And moreouer, that chapter in *Magna Charta* requireth no ſuite of partie to preferre the *enditement*; ſo that it may be done by the Iudges *of Office* well enough.

But this conceit is very ſtrange, that *Biſhops* ſhall not haue authoritie to depriue an *Eccleſiaſticall* perſon from his benefice. It is ſhewed in the chapter afore, that by vſuall and allowed courſe of pleading to a *Quare impedit*, the Ordinarie doeth claime (as of common right) *inſtitutionem & deſtitutionem Clericorum*, in benefices within his *iuriſdiction*. And the olde rule was, *Cuius eſt inſtituere, eius eſt deſtituere*. But perhaps it will be ſaid, he meant, that a *Biſhop* might doe it, but not of *Office*, that is, without a partie, albeit he put a Copulatiue in ſtead of a Diſiunctiue.

But if his meaning be ſuch, he meaneth more then is true. And further, what priuilege or benefite is this to the partie conuented, to be proſecuted by a *partie*, (and therefore perhaps of malice and by ſubornation of proofs) rather then by the *ordinarie* proceeding *of office* and *duetie*, for whoſe ſinceritie, we may more probably preſume and intend?

Moreouer, what if one that hath a benefice will come vnto the *Biſhop*, and there ſtoutly defend *Atheiſme*, *Apoſtaſie*, or de-

nying of *Christ*, or any other *hereſie*, groſſe *blaſphemy*, or *idolatry*: may he not (till ſome *accuſer* be found, or a *partie* to proſecute) depriue ſuch a perſon from his benefice *ex Officio*? What if the beneficed perſon will confeſſe before the *Ordinarie*, that he was neuer called to the Miniſterie, but hath vſurped it, by colour of forged *teſtimonials of Orders*: or that he hath committed *Simonie*, *Inceſt*, *Adulterie*, or hath two wiues liuing at once, or [1] that he neuer ſubſcribed nor read the *Articles of religion*, or being once conuicted, do againe defend ſome errour againſt ſuch *Articles*: may not the *Biſhop ex officio* in all, or in any of theſe caſes, depriue or declare his benefice void, except ſome other will come and make himſelfe a partie? But that he may do it, appeareth [2] by the ſtatute 1. of her Maieſtie: for there it is ſaid, he may enquire (which is alwayes *ex officio*, as ſhall be more plainly ſhewed in the ſecond part) and may puniſh by *Deprination*, &c. as in like caſes hath bene vſed *by the Queenes eccleſiaſticall lawes.*

[1] 13.Eliz.ca.12.

[2] 1.Eliz.cap.2.

CHAP. XVI.

That after fortie dayes, an excommunicate perſon may be otherwiſe puniſhed, then vpon the writ De excommunicato capiendo: And that the ſaid writ may and ought to be awarded vpon contempts, riſing on other originall cauſes eccleſiaſticall, then any of thoſe ten crimes mentioned in the ſtatute 5.Eliz.cap.23.

THe laſt opinions to be handled in this part, be theſe: *viz.* that *an excommunicate perſon ſtanding ſo aboue fortie dayes, may in none other ſort be puniſhed then vpon the writ De excommunicato capiendo.* The other is: that, *the ſaid writ De excommunicato capiendo, ought not at all to be awarded vpon contempts riſing from any other originall cauſes then vpon ſome of the tenne crimes, that be mentioned in the ſtatute* 5.Eliz. cap.23. The firſt is eaſily impugned: for he may be puniſhed twentie pounds by moneth, for abſence from diuine prayer: neither ſhall his excommunication excuſe him, for it is in his owne default. Beſides, it is a great *contempt* in an eccleſiaſticall cauſe, and therefore puniſhable by the *Eccleſiaſticall commiſſion*, vpon the expreſſe wordes vſed in that *Act*, which doeth eſtabliſh

eſtabliſh that *Commiſſion.*

And this ſtandeth with reaſon, where there are great numbers of ſuch wilfull perſons, or ſlacke execution by *Vnder-ſhirifs* and *Bailifs* of that writ, as often falleth out; beſides the great charges, in ſuing of it out. For I dare auow that in ſundrie diœceſſes in the Realme, the whole yeerely reuenues of the *Biſhops* there, would not reach to the iuſticing of all ſuch *contemners* (being of the baſer ſort of perſons) by the courſe of this writ. They might happely to the great charge of the *ſhire*, keepe many of them in priſon long enough: yet they ſhould neuer procure the fees backe againe, that firſt, whether for rich or poore muſt be defrayed, for want of ability in the perſons ſo excommunicated.

Laſtly, the *law eccleſiaſticall* very reaſonably & grauely prouideth in this behalfe, that if a [1] man ſtand excommunicate aboue an whole yere, he may be proceeded with for ſuſpicion of *hereſy*: becauſe the law preſumeth, that ſuch a mã hath ſmal feeling of religion, but rather contemneth it, and nouriſheth ſome damnable opinion againſt *God* and his *Church*. And therefore, ſuch an excommunicate perſon, may be puniſhed by reaſon thereof, otherwiſe then by that writ.

[1] c. excommunicamus. §. qui autem. ex. de hæretic.

All the colour of reaſon that I find alleged againſt this courſe, by the *Treatiſer*, is thus: that on our behalfe it will be ſaid; *this is a ſhorter way then the other purſuite of the writ De excommunicato capiendo; being ouer-troubleſome and full of vnneceſſary circumſtances.* But hereunto he doth anſwer, *that we forget the olde and true ſaying: Compendiaria res improbitas, virtus longa.* Now if he will haue this to be a good anſwere, then muſt he holde; the *ſhorter* way alwayes to be the *woorſe*, and the *longer* the *better*. And where is then the rule of *Logike*, *Fruſtrà fit per plura, quod fieri poteſt per pauciora?* and how is he ſo ſuddenly fallen out with himſelfe, that elſe-where condemneth Courts *eccleſiaſticall* for *lingering conſiſtories?* I perceiue neither *long* nor *ſhort* will pleaſe him *long* together. But his reaſon is *a fallacie of the conſequent.* For though it be but a *ſhort* cut vnto *wickedneſſe*; and the way vnto *vertue* be *long and hard*: yet is not all length commendable, nor yet are all ſhort courſes condemnable.

The latter opinion of the two, here alſo to be handled; doth

croſſe & thwart other of their owne opinions: for the *Ciuill* law ſaith: *Fruſtrà fertur ſententia, niſi parata ſit executio.* A decree or iudgement is of no effect, where execution of ſuch ſentence can not be had. The *Iudges eccleſiaſticall* haue no *compulſorie* meanes to put their iudgements vnto finall execution, ſauing *excommunication*, & the writ *De excommunicato capiendo*, after forty dayes obſtinacie. Thoſe of the impugners of *eccleſiaſticall iuriſdiction* (vnder pretence of the lawes of the Realme) that be ſtraiteſt laced; doe yeeld cauſes *teſtamentarie* and *matrimoniall* to be of eccleſiaſticall conuſance; and (I hope) ſundry others be prooued no leſſe to be.

Now how ſhall any of thoſe be euer effectually proceeded in, ſeeing they are none of the *tenne crimes* reckoned in that *ſtatute*; if for not performance of that which is decreed, the wilfull partie ſhall neuer be attached, for perſiſting vnder excommunication?

It appeareth alſo plainly by the *Preamble*, that the ſayd ſtatute was enacted, for better aſſiſtance vnto iuriſdiction eccleſiaſticall, by more due execution of the writ *De excommunicato capiendo*; eſpecially againſt offenders in crimes of eccleſiaſticall conuſance. The *Ordinaries* (afore this) who had to deale in any matter eccleſiaſticall, and all ſubiects that ſued any other there, had this intereſt; of hauing a contemptuous perſon being excommunicated, and ſo remaining aboue fortie dayes; to be attached and impriſoned by vertue of that writ; vpon what originall cauſe eccleſiaſticall ſoeuer ſuch contempt grew. Now if that ſtatute prouiding but a ſtraiter courſe for execution of that writ, in tenne crimes onely; ſhould withall take away the force and vſe of it, as it ſtood afore at the Common law; not onely in ſundrie other crimes of eccleſiaſticall conuſance ſtill there puniſhable; but alſo in all cauſes *Teſtamentarie*, *Matrimoniall*, *of tithes*, and in all other rights eccleſiaſticall in that Court onely ſtill demandable: then ſhould it worke a cleane contrary effect to the very true drift and ſcope aimed at; and to the meaning it ſelfe of the Law-makers. But this is very vnreaſonable and abſurd to imagine. for, *quæ in fauorem ſunt introducta, non debent in odium retorqueri*: and, *quæ ad vnum effectum parantur, non debent contrarium operari effectum.*

It

It is true, that in the beginning of the body of that Statute, the words be generall in this ſort, viz. *Euery Writ of excommunicato capiendo, that ſhall be granted out of the high court of Chancerie, againſt any perſon or perſons, &c.* Whereupon ſome very learned in thoſe lawes haue thought, that the maner of *granting* it, *returning* and *deliuering* it, which be there eſpecified; doeth reach vnto all and euery writ *de excommunicato capiendo:* but yet that the new penalties there prouided for ſuch perſon excommunicate, as ſhall not yeeld his bodie; are to be reſtrained vnto thoſe onely, who by *Significauit* are certified to haue bene *excommunicated vpon ſome cauſe or contempt, ariſing vpon ſome originall matter of ſome of thoſe ten crimes*, there eſpecified.

This ſeemeth to carie great reaſon with it: for in trueth (that generalitie there notwithſtanding) not only in the *Preamble*, but in diuers partes of the body of that ſtatute, we find wordes taxatiue and of reſtraint; carying the chiefe purport of that Act vnto ſuch writs, as be grounded vpon ſome of thoſe *ten crimes*. For the *Preamble* onely ſpeaketh, *of perſons offending in many great crimes and offences:* of *continuing in their ſinnefull and criminous life*, and of *ſuch offenders*. And the beginning of the bodie of the Statute is: *for redreſſe thereof be it, &c.* and afterward this word of *Limitation* is often vſed, viz. *Such writ of excommunicato capiendo: ſuch perſons excommunicate*; and *ſuch Significauit*. And therefore that ſtatute nor any *Prouiſo* in it cānot be entended, generally to take away the writ *de excommunicato capiendo*, in all cauſes, ſauing in thoſe *ten crimes*; as by this opinion is enforced.

But the clauſe thereof, *Sauing and reſeruing to all perſons hauing authoritie to certifie excommunicate perſons*; doth put all this matter out of doubt and diſpute. For thereby is *ſaued* and *reſerued to them like authoritie to accept and receiue the ſubmiſſions & ſatiſfactions: to abſolue and releaſe, and to ſignifie:* and *thereupon to haue ſuch writs, &c. in ſuch maner and forme as heretofore* (reſpectiuelie) *they haue vſed, as hath bene accuſtomed; and as they or any of them had, or of right ought or might haue had: any thing in that ſtatute ſpecified or conteined, to the contrary hereof, notwithſtanding*. If then they may ſtill *ſignifie in like maner and forme*, ſhall *haue writs* thereupon, may *abſolue and releaſe, receiue ſatisfaction and ſubmiſſion, &c.* as they *had done before that time:* then may and ought the

writ *de excommunicato capiendo*, to be awarded for contempt arising on other originall cauſes eccleſiaſticall, then any of thoſe *ten crimes* in that ſtatute reckoned. For ſo *Ordinaries* did, and had afore that time, and ſince alſo; whatſoeuer this opinion now doeth deliuer to the contrary.

CHAP. XVII.

Of a Prohibition, what it is, where it lieth not, and where it doeth: and how it ceaſeth by a Conſultation: & of the writ of Indicauit.

WHen any Court goeth beyond his bounds, and dealeth in other *matter* or ſort, then the lawes of the land will warrant; there lieth in ſome caſes writs at the common lawe, which are of *Prohibition* or *Indicauit*: and in other caſes, a writ brought in by ſtatute, called *Proniſion and Premunire*: and the *Prohibition* and *Premunire* doe lie as well againſt *temporall*, as againſt *eccleſiaſticall* Courts.

The *Prohibition* is a charge by the kings writ, to forbeare to hold *Plea*, either in ſome *matter* or *maner*, which it is ſuppoſed a man dealeth in, beyond his iuriſdiction, or otherwiſe then lawe will warrant. Euery *Prohibition* is either *Prohibitio iuris* by the very lawe it ſelfe; or *Prohibitio hominis*, where the miniſterie of the competent iudges (in that behalfe) is vſed. Any *Statute* prohibitorie is [1] *Prohibitio Iuris*; *a very prohibition in it ſelfe, and therfore it is a contempt, to ſue againſt it.*

[1] 21.E.3.fol.29.

In a *prohibition* we are to conſider; In what matter it lieth not, at what time it lieth not, where and when it lieth, & how it ceaſeth or looſeth his force. For the firſt, it is [2] prouided by ſtatute, and the king there determineth thus: that *no prohibition ſhall goe out of the Chancerie, but in ſuch caſe, where we haue the Coniſance, & of right ought to haue.* And therefore *Thirning* [3] ſaid; *when we ſee the iuriſdiction belongeth not to vs; wee will graunt a Conſultation.* So that if the matter be meere Eccleſiaſtical, there lieth no *Prohibition.*

[2] 18.Edw.3. pro clero,ca.5.

[3] M.2.H.4. fol.15.

Touching the ſecond point, it ſeemeth a *Prohibition* is not to be granted, till by ſight of the *Libel*, there appeare cauſe to grant it. For [4] *Henkſtone* held, that *by the ſtatute de Regia prohibitione &*

[4] 31.H.6.fol.14.

de

de coniunctim feoffatis in fine, a man ſhall not haue prohibition, antequam lis ſit conteſtata in curia ſpirituali: which is, till a libell be put in, and the partie put to anſwere it; & this is to be certified to the Chancellor by the view of the Libell: which *Forteſcue granted.*

But this hath two exceptions: one is, when the copie of the Libell (contrary to the Statute 2. H. 5.) is denied: for vpon this cauſe, I finde a [1] *prohibition granted, that the Ordinarie ſhould ſurceaſe, till the copie of the Libell, according to that ſtatute, were deliuered.* another exceprió is in ſome court, where a ſurmiſe is made, that the ſuite (in trueth) is for ſome other matters, then are expreſſed in the Libell: for *Brooke* reporteth *that* [2] *a man may haue a prohibition in the kings Bench vpon ſuch a ſurmiſe (as for example by ſurmiſing the ſuite to be (in deede) for great timber, though it bee demanded in the Libel, vnder the name of Sylua cædua) but he ſaith it is otherwiſe in the Common Pleas.*

[1] M. 4. E. 4. fol. 37

[2] Brooke tit. prohib. nu. 17.

Touching the third point, for what cauſes a *Prohibition* is granted: I find it may be granted either in reſpect of ſome of the parties to the ſute, or in regard of the Iudge before whom it is, or for the very matter handled. For the firſt of theſe three: *If a* [3] *Parſon of a Church do ſue another Parſons farmour or ſeruant for right of tithes, being not ſuch as can trie the right of tithes:* Fineux *held that a prohibition may be granted.* Hereof ſee further in the 6. chap. afore.

[3] T. 12. H. 7. fol. 22.

Touching the ſecond; it may be granted, either for the Iudges contempt; as in not deliuering copie of the Libell, as is afore touched: or for that he hath not (in deed) any iuriſdiction. for ſo it was iudged by *Hankeford* and by the whole Court, (as it ſeemeth) in the vicar of *Saltaſh* his [4] caſe being cõuented before the *Popes Collector. Though a Conſultation did otherwiſe lie, the court wil not grant it to one, that hath no iuriſdiction in right.*

[4] M. 2. H. 4. fol. 15.

Concerning the third and laſt poynt of the three, if the matter bee *Temporall*, that is ſuch, *as* [5] *there lieth redreſſe for, by ſome Writte in the Chancerie, then there lieth a Prohibition*, as ſeemeth by Statute: to which agreeth the [6] place before alleaged, out of the booke of *Doctor & Student.* Yet this hath alſo two exceptions: one is, whereas the Spirituall Court holdeth Plea quite to another end. For [7] *when one & the ſelfe ſame caſe is debated before Iudges ſpiritual and temporal (as for beating of a Clerke) there the ſtatute is; that (notwithſtanding the ſpirituall iudgement) the kings Court*

[5] Stat. de conſultat. 24. Ed. 1.

[6] Lib. 2. ca. 24.

[7] Artic. Cleri. 9. Ed. 2. cap. 6.

Court also shall debate it. For both these conisances tending the one to the *amends*, the other to the *excommunication*; may stand together, as is shewed in the 8. chapter.

[1] T.9 H.3.per Fitzh. Prohib. The second exception hereof seemeth to be,[1] *when one Clerke sueth another in the spirituall Court, for the goods of his house; for there lies no prohibition:* as when one *Abbot* sueth another. Secondly, a *prohibitiō* lieth, where a matter (being at first ecclesiasticall,) brings at last in debate, a meere *temporall* matter with it, to be determined. Therefore it was holden, that *so soone*[2] *as it appeareth, that the right of tithes comes in debate, the laie Court shall cease, and be out of iurisdiction: and the same law is of the spirituall Court: for if it may appeare, that the right of aduowson may come in debate, although it appeared not at first, the spirituall Court must surcease: quod fuit concessum.* This may happen (as for example) when suite is brought (at first) for right of tithes; and it fals out by depositions or otherwise; *that the tithes*[3] *demanded amount to the 4. part of the benefice by yeere:* in which case it is determined, *that the temporall Court shall haue connsance,* euen as if the right of *Patronage* were in demand principally.

[2] 38.H.6.fol.21

[3] Circumspectè agatis.13.Ed.1.

[4] Doctor & Student.Loco.d. Thirdlie, a *prohibition* lieth for such a cause,[4] as albeit there lie none action for it in a temporall Court, yet the matter is such, as of custome neuer belonged to an ecclesiastical court. As if an ecclesiasticall court would hold Plea against an executor, vpon a bare contract made by his testator: for neither the court may heare it, nor yet there lieth action for it in a *Temporall* court.

Fourthlie, there lieth *Prohibition,* when the suite tendeth to determine and giue execution in a temporall matter; as money, &c. being due otherwise, then by the iudgement giuen in the *Court ecclesiasticall.* Therefore *if a composition by indenture*[5] *be made by an Ordinarie betwixt two ecclesiasticall persons; that the one shall haue tithes, the other an annuitie, with penaltie for default of paiment: the suite for this shall bee at the Common lawe: but the suite for any thing that riseth vpon a iudgement giuen in the spirituall Court, shalbe there,* per Hill. *For*[6] *though amends bee to bee made by a certaine summe of money, this is no necessarie cause to grant a prohibition, no more then when the suite is for tithes, yet the condemnation in money being the valew of them: nor when a penance is redeemed by the partie for money, which may be sued for in a spirituall court,* per Butler.

[5] 11.H.4.fol.85.

[6] T.12.H.7. fol.22.

Because

Becauſe *when an offence is done to a man, it is* [1] *reaſon that he haue amends for it: but there can be no more proper amends then money, becauſe euery thing may be valued by money*, per *Keble*. Which they ſpeake to prooue; that amends in money may be awarded in an *eccleſiaſticall Court* for *Diffamation*: and ſo the iudgement then paſſed, vpon this ground (among others) as [2] *Brooke teſtifieth*.

[1] Ibi lem.

[2] Brooke Conſultation. nu. 5.

And [3] *there is a great diuerſitie betwixt a duetie or ſumme of money or other things at the firſt demandable and determinable at the Common lawe; and ſuch a ſumme as before ſentence giuen in the Spirituall lawe, is not due at all. For the firſt, there lieth a Prohibition, but not for the ſecond: for otherwiſe, it would followe, that the ſpirituall lawe might giue a iudgement, which it could not put in execution. but this were abſurd*, per Reed & Tremaile.

[3] T. 12. H. 7. fol. 22.

Fiftlie, it is ſayd that there lies a Prohibition, when the partie ſued hath an action giuen him at the Common lawe, for the *originall* and *principall* matter, whereupon the ſuite at the *eccleſiaſticall lawe* did grow. The caſe was thus: *A man* [4] *reported that the Abbot of S. Albanes did detaine his wife in the ſaid Abbots lodging againſt her will; to the intent to make her his harlot. the Abbot hereupon brought his action of Diffamation in the Court eccleſiaſticall; and the huſband his prohibition. newe becauſe the huſband might haue his action of falſe impriſonment at the Common lawe againſt the Abbot*, Brian *held, that a Conſultation was not to be graunted.* de hoc quære.

[4] T. 22. Ed. 4. fol. 20.

A prohibition ceaſeth and looſeth his force, after a [5] *Conſultation* be once granted. This may bee prooued by the Statute *De Conſultat. for the Chanceller or chiefe Iuſticer of the king vpon ſight of the Libell, &c. if they can ſee no redreſſe by Writ, &c. ſhall write to the ſpiritual iudges, &c. to proceed, notwithſtanding the kings prohibition directed to them before.* But more plainlie after: *Where* [6] *a conſultation is once duely granted, the Iudge may proceed in the cauſe, notwithſtanding any other prohibition thereupon to him to be delinered: ſo the matter in the Libell be not changed.*

[5] Stat. de Conſultat. 24 Ed. 1.

[6] 50. Ed. 3. ca. 4.

The writ of Indicaunt *is* [7] *likewiſe a kind of Prohibition; and lieth eſpecially & naturally for a ſuite of tithes, which do amount to a fourth part or aboue, of the whole benefice. It lieth alſo for the Patrone, where his Clerke is impleaded for the aduowſon* (id eſt) *the right of Patronage, in a ſpiritual Court. the Patrone and Clerke that is ſued in the*

[7] Fitzh Natur. bre. tit. Prohibition. fol. 45.

court eccleſiaſticall may ſue it foorth both againſt the Eccleſiaſticall Iudge, and the partie that ſueth there. But it [1] *lieth not till the Libell be brought to be viewed into the Chancerie,* & lis [2] etiam conteſtata. *and* [3] *it lieth onely before ſentence be giuen in the Court eccleſiaſticall: for it is afterward voyd.*

[1] 34. Ed. 1. de coniunctim feoffat.
[2] Fitz. h. ibid.
[3] Regiſt. fol. 47.

CHAP. XVIII.

An Analyſis or vnfolding of the two ſpeciall ſtatutes touching Præmunire, with ſundrie queſtions and doubts about that matter, requiring more graue reſolution.

IN the matter of Præmunire (which is a queſtion falling often in doubt about execution of Eccleſiaſticall iuriſdiction, wherein as in the matter of prohibition & conſultation you deſired earneſtly that I would write vnto you what I thought) I cannot in any point ſatiſfie my ſelfe, much leſſe you: by reaſon that this matter is enwrapped in ouer many difficult doubts for me to vnfold. yet I haue ſome thing conſidered of it, & do truſt that I ſhal be able to point out vnto you certaine general heads, whereunto moſt of the doubts cõmonly made or hapning, may not vnfitly perhaps be referred: that thereby *tanquam Theſei filo* you may be directed (as opportunitie ſhal ſerue) what & how in this behalfe to enquire of the reuerend Iudges, or of other great learned and graue men of that profeſſion.

There be two ſtatutes, whereupon it is principally grounded. The firſt is [4] of *Prouiſors*, eſtabliſhed in the time of king *Edward* the 3. the complaint and griefe there propounded was, that the *kings people were drawen out of the Realme, to anſwere vnto things, whereof the Coniſance pertaineth to the kings Court: and that iudgements there giuen were impeached in another court.* The miſchiefes then noted thereupon were, *the preiudice and diſheriſon of the king and of his crowne, and of all the people of the Realme: and the vndoing and deſtruction of the Common lawe of the Realme.* The remedie there giuen for theſe miſchieues was: that *if any of what conditionſoeuer (being of the kings liegeance) ſhould drawe any out of the realme in plea, whereof the Coniſance pertaineth to the kings court, or of things, whereof iudgements be giuen in the kings court, or which do*

[4] 27. Ed. 3. cap. 1. de Prouiſor.

ſue

ſue in another court to defeate or impeach the iudgements giuen in the kings court, ſhould haue day, &c. as is there more largelie by the ſanction contriued.

The other ſtatute is,[1] of the time of king *Richard* the 2. there is ſhewed and laied foorth, that *the Coniſance of plee of Preſentments to Beneſices, belongeth onely to the kings court by the old right of his crowne*: and that *Archbiſhops, Biſhops, and other ſpirituall perſons hauing the inſtituting vnto ſuch Beneſices (within their iuriſdictions) be bound, and haue made execution of ſuch iudgements, by kings commandements, without interruption: and that alſo they bee bound of right, to make execution of many other of the kings commandements:* but it is there complained, that *proceſſes and cenſures of excommunication vpon certaine Biſhops of England, were made by the Biſhop of Rome, becauſe the ſayd Biſhops haue made execution of ſuch commandements: and that hee purpoſed to tranſlate ſome Prelats out of the realme, & ſome frō one biſhoprike to another within the Realme, without the Kings knowledge, and without their aſſent that ſo ſhould be tranſlated.* There are aſſigned alſo for miſchiefes hereupon growing, *the open diſheriſon of the crowne, the deſtruction of the king, of his lawe and realme,* and that *theſe things are againſt the kings crowne and regalie,* that *they defeate and deſtroy the ſtatutes,* that they tend *to make the realme ſubmitted to the Biſhop of Rome, and the lawes and ſtatutes of it by him to be defeated and deſtroied at his will, that they drawe out of the realme (againſt the kings will) the ſayd Prelates his liege perſons of his councell, that be much profitable and neceſſarie to the king, and to all his realme, and that theſe deuiſes will beare away the treaſure of the Realme:* for remedie whereof it is prouided, what ſhall not bee done: viz. that *none ſhall purchaſe or purſue, or doe to bee purchaſed or purſued*: where? *in the Court of Rome or elſewhere*: what? *any ſuch tranſlations, proceſſes, and ſentences of excommunications, buls, inſtrumēts, or any other things:* of what ſort? *which touch the king, againſt him, his crowne and his regalie, or his realme:* in what maner touching theſe? *as is aforeſayde*. and likewiſe, that *none ſhall bring them into the Realme:* or being perhaps brought in by another, *ſhall receiue them*; or being neither brought in by them, nor yet receiued frō others, but comming (ſome way) to their knowledge, ſhall not make any notification, or any other execution of them:

[1] 16. R. 2. cap. 5.

where? *neither within the realme nor without, &c.* vpon paines there at large conteined.

Of thoſe generall heads whereunto I ſaid afore, that all queſtions of *Præmunire* might be referred, there be ſome that being expreſſed in theſe ſtatutes, are (I thinke) without all doubt, to be within the compaſſe thereof: as by the firſt of theſe two, *to draw any of the Queenes liegeance out of the realme in a plea, whereof the coniſance pertaineth, or iudgements be giuen in the kings Court.* And that which is ſayd of *a Plea in the kings court*, is alſo drawen by ſome opinion, vnto a court Eccleſiaſticall, for [1] *Yeluerton in the Kings bench held opinion oftentimes, that if a Clerke doe ſue another in the Court of Rome for a ſpiritnall matter, whereof he may haue remedie within the realme, that he is in caſe of Præmunire*, quia trahit in placitum extra regnum. And [2] *Fitzh.* holdeth, that *for collation of a Prebend ſued out of the realme, a prohibition doeth lie.*

1 9. Ed. 4. fol. 3.

2 Fitzh. Nouat. br. fol. 44. lit. H.

Secondlie, it is an vndoubted *Præmunire* by that ſtatute *to ſue in another court, to defeate or impeach the iudgements giuen in the kings court.* In theſe wordes of (another court) there ſeemeth to be an oppoſition and ſeuerance of ſuch a court, from the *Kings court:* the rather, becauſe both the *Preamble* and the body of the ſtatute do mention, *drawing men out of the realme in Plea.* Whereof at that time there was no colour for any man to be drawen any whither, but onely to the court of the biſhop of *Rome*, whether he reſided there at *Augnon* in *France*, (where the Popes about that time did lie 70. yeeres together) at *Bononie*, or elſewhere ſoeuer.

Therefore for the true vnderſtanding of thoſe words enquire: If any of this realme of late yeeres (whiles the parliament of *Paris* was eſtabliſhed by the authoritie of the *French* king) vpō colour, that the *Queenes maieſtie* is in very right Queene of *France*, ſhould haue brought proceſſe thence againſt another ſubiect to appeare there: whether this had not bene a *Præmunire* by that ſtatute? likewiſe, If any of the *Q.* Courts (not authoriſed therunto by law vpon writ of errour) ſhould defeate a iudgement giuen in any other of the *Queenes* courts: enquire, whether this be within the meaning of thoſe words, notwithſtanding the diuiſion and diſtinction, whereby ſuch *another court* ſeemeth to be ſeuered and made a diſtinct thing from all the *Queenes* court?

Thirdly,

Thirdly, it is an vndoubted *Præmunire* according to the later of the foreſaid two ſtatutes, *to purchaſe or purſue, or to procure ſo to be done, in the court of Rome or elſe-where, any ſuch tranſlations &c. or any other things, which touch the King, be againſt him, his Crowne and Regaltie, or his Realme, as is* (there) *aforeſaid: or &c.* as is there further conteined.

Fitzherbert reporteth, [1] that *the opinion of the court was* (Paſchæ 11. H. 7.) *that* Alibi *in the ſaid ſtatute was vnderſtood of Biſhops courts: ſo that if a man ſue there, for a thing that belongeth to the Common law, he ſhall be in the* Præmunire. Therefore [2] *was it holden by ſome, that a benefice Donatiue by the Patron is a meere lay thing, and the Biſhop ſhall not viſit it, and therefore ſhall not deprive from it, and if he meddle in this caſe, it is a* Præmunire: and ſayth that *Barlow* biſhop of *Bathe*, for depriuing the *Deane* that had it as a *Donatiue* by the Kings Letters patents, was driuen to ſue a pardon.

[1] Fitzh. tit. Præmunire. nu. 5.

[2] Brooke titulo Præmu. nu. 31.

Pineux chiefe [3] Iuſtice, ſaith; *a ſpirituall man may execute temporall iuriſdiction, as the Biſhop of Durham doth in his countie Palantine* (*viz.* as he hath *iura regalia*, but not as a Biſhop) and (ſaith he) *the Biſhop ſhall puniſh his Clerks by* Præmunire *for ſuing in Spirituall courts for a cauſe temporall.* But whether that Biſhop hath this authoritie (ſeeing *Præmunire* is brought in by ſtatute) there is a *Quære inde* made, as of a matter doubtfull.

[3] 15. H. 7. fol. 9.

It is holden, that *a Prohibition doth* [4] *often lie, where a* Præmunire *doth not: as of tithes of great trees &c. for the nature of the action doth belong to the Spirituall court, albeit not that very cauſe in that forme; but when it is of a lay matter, or of a thing that neuer did belong vnto the Court ſpirituall, herein* (as is ſaid) *there lieth a* Præmunire.

[4] 24. H. 8. titulo Præmu. num. 16.

But theſe notwithſtanding, ſundry doubts are made in this behalfe, becauſe at this day all *iuriſdiction Eccleſiaſticall* is now truely acknowledged, and is *in deed* (as it was alwayes *in law*) in the *Soueraigne prince*, and from her *prerogatiue royall* deriued downe to others, no leſſe then the *Admirall* court is, or the court of the *Conſtable of England* in times paſt was, when it was vſed: albeit they vſed their peculiar ſeales, and names to the proceſſes there ſped. And I haue heard very credibly, that ſome reuerend and great learned Iudges (whiles they liued) were of opinion, that

that for an *Eccleſiaſticall Iudge* to deale in a matter apperteining (in very truth) to a *Temporall* court, yet for ſome neereneſſe and coherẽce, by him probably ſuppoſed to be an *eccleſiaſticall* cauſe; could not at this day be a *Præmunire*; but ſubiect onely to a *Prohibition*, and puniſhable as a *contempt*, as it was at the Common law, vpon an attachment after *Prohibition*. Which opinion if it be ſound; then the *Treatiſer* is farre wide from the truth, where he ſaith: that for men *to deale in any cauſe not belonging to their iuriſdiction, is Præmunire*. This were very hard and rigorous, if euerie miſtaking or going beyond their commiſſion by Iuſtices of Peace, by any Iudges eccleſiaſticall or temporall, ſhould be no leſſe then *Præmunire*. I haue heard it deliuered by great Lawyers, that ſo to do, doth but make the Act void, as being *coram non Iudice*, and inferreth no ſuch grieuous penaltie. For it is alleged, that (*Alibi*) in the ſtatute was put in, to enclude proceſſes deriued from the *Popes* authoritie, albeit he kept his abode any where els then at *Rome*. In which reſpect it is affirmed in a [1] ſtatute; that the ſaid ſtatute of *Proniſion* and *Præmunire* 16.R.2. was made againſt ſuch as ſue to the Court of *Rome* againſt the kings crowne *and dignitie royall*. And it ſeemeth to ſome, that *Alibi* can not now ſignifie *Biſhops* and their Courts, which are called the *Queenes Eccleſiaſticall courts and Iudges*, and the *Canons* by law eſtabliſhed, the *Queenes Eccleſiaſticall lawes*. Inſomuch, as *the power giuen by ſtatute to her Maieſtie, by her Letters Patents to* [2] *name ſuch as ſhall execute all maner of iuriſdictions touching or concerning any Spirituall or Eccleſiaſticall power*, is brought [3] *to proone the ſufficient ordinarie authoritie, that Biſhops haue giuen vnto them, by the very Letters Patents directed from her Highneſſe, for their confirming and conſecrating, &c.*

[1] 25.H.8.ca.21.

[2] 1.El.cap.1.

[3] 8.El. cap.1. in the Preamble.

It is further alleged, that ſuch dealing of an Ordinary *toucheth not the King, againſt him, his Crowne and Regalie, or Realme*, as not falling into any of the miſchiefs, whereof that ſtatute was meant to be a remedie.

And for that (all iuriſdiction *Eccleſiaſticall* is now both in *fact* and *Law* vnited to the *Crowne*, and from thence deriued) if it ſhould be ſayd that the handling of a matter but in an incompetent court (yet eſtabliſhed by the *Queenes* authoritie) were in that high degree of offence & puniſhment againſt her *Crowne*: ſome

ſome thinke it reacheth thus farre; as to implie an incompatibilitie betwixt the *Crowne* and *Eccleſiaſticall iuriſdiction*; and ſo by implication, to denie her *iuſt Royall prerogatiue* ouer all perſons, and in all cauſes aſwell *Eccleſiaſticall* as *Temporall*; as if theſe could not both flow from the *Crowne*, nor ſtand together and meet in one perſon; which is moſt erroneous to thinke, and traiterous to affirme.

It is likewiſe alleged, that this were to make in effect a *Præmunire* to lie in euery caſe, where a *Prohibition* may, and alwayes hath ſerued the turne. Whereas a *Præmunire* ſeemeth to be as a remedie prouided, where a *Prohibition* could not ſerue, to ſtay the courſe of proceeding. And that euen before the ſupremacy was acknowledged to the *Crowne*, no *Præmunire* vpon this point (onely) is reported in the bookes of termes and yeeres, to haue bene inflicted: but onely for purſuing pleas of the conuſance of the kings court out of the Realme, ſeeking to defeat iudgements there giuen, and procuring Bulles from the court of *Rome*, in derogation of the lawes of the Realme.

Moreouer, it is to this purpoſe alleged, that by the [1] ſtatute authoriſing two and thirtie perſons to ſet downe lawes *Eccleſiaſticall*, though repealed, it was prouided (as they thinke) in affirmance of the law, that *no man for executing any of them, ſhould haue incurred contempt, paine, forfeiture, loſſe, nor haue bene in danger of any action or ſuite of præmunire.* Yet if ſuch lawes had bene framed, the *Iudges eccleſiaſticall* might (by miſtaking) haue giuen ſome cauſe of *prohibition*. Therefore it is gathered by like equitie, to be very hard, that an *Eccleſiaſticall Iudge* meaning to do his dutie, and but to execute *Eccleſiaſticall iuriſdiction eccleſiaſtically*, yet by ſimilitude and neere coherence of one matter with another, miſtaking and ſo exceeding his authoritie (a thing very eaſie in the *Common* law, wherein ſometimes do happen varietie of iudgements, amongſt the oldeſt profeſſers of it) if before any *prohibition* brought (as it were to forwarne him) he ſhould hereupon de drawen at the very firſt puſh into a *præmunire*. For by like reaſon, if a court *Baron* ſhould heare plea of a matter aboue fortie ſhillings, a *præmunire* in ſtead of a *prohibition* might be brought againſt them.

[1] 3. & 4. Edw. 6. cap. 11.

Therefore enquire, and ſeeke to enforme your ſelfe aſwell in

in the premiſſes, as of theſe queſtions following, what is to be

1. Doubt. holden for law: *viz.* in holding plea in an Eccleſiaſticall court of a temporall matter, whether there be not a difference, when it is propounded vnder the very name of a temporall action, and when it is propounded vnder the name of an eccleſiaſt. matter?

2. Doubt. And whether the Iudge be in danger before the matter be opened vnto him, or no? For I thinke in no Court temporall or eccleſiaſticall, the Iudges peruſe the writs, declarations &c. when they are firſt put in.

3. Doubt. And whether it be as great an offence in law but to hold plea, as to giue iudgement, and to award execution in an Eccleſiaſticall court of a temporall matter?

4. Doubt. Alſo whether it be like degree of offence for an eccleſiaſticall Iudge to execute a temporall matter by cenſures eccleſiaſticall, as it is to execute it, or a matter eccleſiaſticall by temporall, *viz.* fine, impriſonment, loſſe of limme, or ſuch like?

5. Doubt. Likewiſe of what qualitie the offence is to go on in plea in a Court eccleſiaſticall after a meere temporall matter (as right of aduowſon, &c.) falleth in controuerſie, principally to be determined?

6. Doubt. Or to holde plea there in a matter worthie of redreſſe, yet neuer of cuſtome handled either in temporall or eccleſiaſticall Court, nor whereof any remedie lieth at the Common law?

7. Doubt. Alſo what offence it is to make lawes temporall or eccleſiaſticall without the Princes aſſent?

8. Doubt. What it is to deale in temporall cauſes or courts, without commiſſion? and what in eccleſiaſticall?

9. Doubt. And laſtly of what degree and qualitie of offence is it, for a Court temporall to holde plea of a meere eccleſiaſticall cauſe? or to deale in cenſures eccleſiaſticall?

10. Doubt. Or for ſuch a court to holde plea of a temporall matter, being no competent Iudges thereof? as for example, if the Court of Common pleas, or the Eſchequer ſhould deale in pleas of the Crowne, that be capitall? with ſuch like a great number. And ſo thus much for the firſt part.

The end of the firſt part.

THE SECOND PART

OF

AN APOLOGIE,

FOR SVNDRIE PROceedings by Iuriſdiction Eccleſiaſticall; of late times by ſome chalenged, and alſo diuerſlie by them impugned.

This ſecond part (eſpeciallie) treateth of the two ſeuerall wayes of proceeding in cauſes Criminall, viz. *by way of Accuſation*, and *ex Officio Iudicis*.



Imprinted at London by the Deputies of CHRISTOPHER BARKER, Printer to the Queenes moſt excellent Maieſtie.

¶THE PREFACE,

wherein is declared, howe the foure *opinions put ouer vnto this place doe* fall in with the challenges of the Innouatours; and a generall diſtribution made of matters to be handled in the ſecond and thirde Parts.

THe ſecond part of this treatiſe containeth our proofes, together with anſwere to the obiections made againſt the maner of practiſe of iuriſdiction Eccleſiaſticall by thoſe, who do euen profeſſe themſelues to endeuour an innouation in the frame of gouernment of this Church of England. But wee meane not in this place to handle all, which they obiect in this behalfe, but only ſome ſuch of them, as touch the maner and fourme of the proceedings in the exerciſe thereof. For it is knowen they take ſundry other exceptions, as againſt the maner of calling to function Eccleſiaſticall, againſt the ordination, againſt ſundry the callings and the functions themſelues, againſt deriuing of the iuriſdiction

Eccleſiaſtical *from the* Prince, *againſt the* matters handled *by that iuriſdiction, and againſt* the maner of handling *them in ſundry other reſpects, condemning them as* Antichriſtian *and contrary to Gods word. All which are of another conſideration, and not fit here to be ripped vp.*

I finde foure opinions (pretending that the lawes of the Realme be againſt the maner of entrance *into ſome ſuites, and againſt* certaine proceedings *Eccleſiaſticall) that are mentioned in the generall* Preface *to haue bene put off vnto this place, for auoyding of needeleſſe repetition, and as falling here more fit to be diſcuſſed, among other like obiections of the* Innouatours.

The firſt of them that we put ouer vnto this place is, that an Eccleſiaſticall court may not proceede without accuſation or preſentment: *meaning (as I take it) a preſentment by Officers ſworne for that purpoſe. If this were true (according as the proprietie of the wordes importeth) then* Ordinaries *might not ſo much as deale in thoſe two excepted* cauſes *of* matrimonie *and* teſtament, *nor in any other concerning* rights *and* dueties Eccleſiaſticall, *but onely in offences and* crimes *puniſhable by that iuriſdiction. For* an accuſation *or* preſentment *hath none vſe, but in matters of* crime *or* offence *incident vnto that iuriſdiction to puniſh. Beſides that, this opinion doth contradict the next following. For this implieth, that if the matter be Eccleſiaſticall, and that there be either accuſation or ſuch* preſentment; *then may the Iudge Eccleſiaſticall proceede; ſo that if there be but* a preſentment *without* any accuſation, *his proceeding without a partie, which is to proceede* ex officio, *ſhall be warranted. Whereupon doeth followe, that proceeding* ex officio *is not tied to thoſe two cauſes onely* of Teſtament *or* Matrimonie, *as the next opinion doth holde.*

For the ſecond is, that no lay perſon may bee cited *ex officio*

officio in any cauſe, but either teſtamentarie or matrimoniall: *which if it were true, though a lay man be duely preſented for any crime; yet ſhall hee neuer bee cited for it, or brought into queſtion, for want of an accuſer to proſecute it. Concerning* the citing of laye perſons, *abſolutely in any cauſe beſides thoſe two, ynough hath beene ſaide in the former part. So that in this opinion* the citing *ex officio onely remaineth needefull to bee further ſpoken of. Truely if the authour of it had vnderſtood what he writte, he would neuer haue put it in the tale or reckoning. For of all other cauſes Eccleſiaſticall whatſoeuer, there can be leaſt vſe of proceeding* ex officio *in thoſe two: becauſe the chiefeſt, and almoſt onely vſe of it is, in dealing againſt* crimes and offences. *But I wil bring theſe two opinions into a briefe thus: the firſt ſeemeth to permit proceeding of Office in an Eccleſiaſticall matter, ſo there be a ſolemne* preſentment *precedent. The ſecond condemneth all proceeding without a partie (ſauing in thoſe two caſes) and ſo (in effect) in all cauſes, if it haue none vſe in thoſe two.*

The third of thoſe opinions is, that albeit a matter bee ducly preſented againſt a man, yet he may not be examined vpon his oath, as of incontinencie or ſuch like. *Whereby (I thinke) is meant, that hee may not be ſo examined of any criminall and penall matter.*

The laſt opinion of the ſaide foure, is: that no man is bound to declare any matter againſt another, except there be ſome, that is an accuſer. *So that by this laſt, no witneſſes ſhall euer be had, when the Iudge proceedeth* ex officio, *except themſelues liſt, which commonly none wil thruſt himſelfe into, but vpon ſome pique or humor of enmitie. And ſo an* accuſer *who for the moſt part commeth in of malice ſhall (by this opinion) haue compulſories to force witneſſes to teſtifie: but a magiſtrate proceeding for ſatisfaction*

of his dutie only, ſhall not. By the way may be noted, that hereby alſo that opinion is ouerthrowen which holdeth, no man to be bound againſt his will to teſtifie, but in cauſes matrimoniall or teſtamentary: for accuſation *is onely of offences. By this opinion is implied, that when there is an* accuſer, *a man may bee compelled and is bound to declare a trueth againſt another. Which laſt being ioyned to the former, viz.* that albeit a matter be duely preſented (that is criminall, and may be penall to him) yet he may not be examined of it, vpon his owne oath: *doth come to this paſſe, that of an Eccleſiaſticall crime, there is (by lawe) no way to conuict a man, except ſome man will be an* accuſer, *or els by voluntarie witneſſes* qui ſeſe ingerunt ad teſtimonium: *viz. ſuch, whome the very lawe of nations doth entend to be enemies vnto the partie, becauſe they thruſt themſelues into the matter.*

You are not to marueile that the opinions of thoſe, who ſhoote at one generall marke, are ſo abſurd, and do ſo varie and iarre among themſelues, and doe as it were confront one another. For you remember, quòd vno abſurdo dato, multa conſequuntur: *and that trueth is ſimple, conſtant, and like it ſelfe, and therefore no trueth is diſagreeing from another trueth: whereas vntrueth is manifold, and variable from it ſelfe. For two contraries can neuer be both true, but they may be, and are oftentimes both of them falſe.*

The firſt of theſe opinions then taketh away all proceeding, either in crimes, or in any other cauſes, where there wanteth an accuſation or ſuch ſolemne preſentment, as the author of it meaneth. The ſecond (in effect) taketh away all proceeding ex officio, *but eſpecially in crimes and offences. The third impugneth all examination by the othe of the partie, in a matter criminall and penall. The laſt woulde ouerthrowe all vrging of witneſſes to teſtifie, in a cauſe moued* ex officio, *viz.*

where

where there is none accuſer, *yea though there bee a ſolemne* preſentment.

Theſe foure challenges (among others) are alſo made againſt iuriſdiction Eccleſiaſticall, by the innouators, not onely for contrarietie vnto the lawes of the Realme, but for contrarietie alſo to Canon *lawe, to* Ciuill *lawe, to* Gods *lawe, and vnto reaſon, as is by them pretended.*

But aſwell their other exceptions, that of late haue beene taken by any of them, and ſtirred vp againſt the maner of exerciſing iuriſdiction Eccleſiaſticall, (ſo farre as I can learne) as alſo theſe foure laſt recited falling in with them (albeit all their ſaid opinions be not holden by euery of them, but according to the varietie of their humors and ſeuerall capacities) may be reduced (not vnfitly) vnto theſe two heads.

They doe reſpect, either the manner of entrance into the ſuite, *or els* the fourme of proceeding in it. *In the* maner of entrance (*you ſee*) *they challenge it, for that* it is not either at the ſuite of ſome accuſer, or vpon a ſolemne Preſentment: *Or for being* ex officio *in any other cauſe, then thoſe two of teſtament, or matrimony, wherein (in very deede) ſuch proceeding hath little or* none *vſe.*

In the courſe of proceeding in the ſuite, *they take exception, partly againſt ſome* principall acte *therein vſed: and partly againſt ſome meaner circumſtances.*

In that more principall acte (viz. of giuing an othe) they impugne either the examination vpon othe of the partie himſelfe, *or* the examination of witneſſes, concerning their brethrens actions. *Touching* the othe of the partie, *both fault is found by ſome* with the ceremonie vſed in giuing the othe, *and becauſe* the othe is giuen in a cauſe criminal and penal to themſelues. *In the ceremonie at taking an oth, there is reprehended (by ſome)* the laying of the hand on a booke, *and* the ſwearing by the booke, or by the

the contents of it. *Of* meaner circumstances (*falling out in proceeding*) *that they challenge, some are concurring with the very tender of the oath* (as that they haue not distinct knowledge of euery particular, whereupon they are to be examined, before they resolue, whether to take the othe or not: *and other are* ensuing the othe and examination: *as that* the Iudges doe not rest in that which is affirmed or denied vpon their oth, but oftentimes proceede to a further examination by witnesses, vpon the same pointes. *All which I mind* (*God willing*) *to prosecute, in the same order, that I haue here set foorth: hauing first touched some matters, that I holde not vnnecessary to be knowen by the vnlearned sort, for the better opening and vnderstanding of the disputations following.*

THE

THE CONTENTS OF
the Chapters of the Second part of this *Apologie*.

OF the diſtinction of offences: and ſeuerall kindes and endes in puniſhing them, with the neceſſity of puniſhments. *Chap.* 1.

Of two ſorts of proſecution of crimes and offences, *viz.* by *a party* & *of office*: the practice of them in Scripture; and in the ſeuerall Courtes of this Realme. *Chap.* 2.

Of the ſundry kindes of obiecting crimes by *a party* mentioned in the *Ciuill* law: as by reaſon of a mans publike charge and function: alſo by way of *Exception*, *Supplication*, *Complaint*, *Delation*, and *Accuſation*. The true ſignification of the word *Accuſatio*: his diuers acceptions, definition & expoſition thereof; with ſome reaſon of the frequencie of *accuſation*, in courts of the *Ciuill* lawes, in former times is alſo declared. *Chap.* 3.

That the proſecution of crimes by way of *Accuſation*, is in moſt places forbidden or growen into diſuſe: the reaſons hereof, be partly the danger to the Accuſers, and partly the hatefulneſſe of that courſe. Therein alſo is diſputed, whether all *Accuſation* be vnlawfull; and certeine points deliuered to be obſerued by all them, that will accuſe others. *Chap.* 4.

Of the ſeuerall acceptions of this word *Officium*: the ſignification of *Inquiſitio*, *Quæſtio*, *Crimina ordinaria & extraordinaria*: the reaſon why *Inquiry by office* came in place of *Accuſation*: of *Enquiry generall* and *ſpeciall*: *of Enquiry ſpeciall ex officio nobili ſiue mero*, *mixto*, *& promoto*: and of the priuileges of proceeding *ex mero officio* aboue the other. *Chap.* 5.

Of *Denunciation*, a ſpeciall meanes of ſtirring vp the *Office*: of the manifolde vſe thereof, in the olde Common weale and Empire of *Rome*: and at this preſent on the other ſide the Sea: the general acception of that word; and of foure kindes of *Denunciation*: how they differ one from another: what is required in them: and when a *Denouncer* is to be condemned or excuſed of expenſes. And what courſe of dealing againſt crimes and offences is holden both in courts of the Eccleſiaſticall *Commiſſion*, and in *Ordinary* courts Eccleſiaſticall in this Realme. *Chap.* 6.

That the *Ciuill* and *Canon* lawes allow ſundry meanes to ground a *Speciall Enquiry of office*, againſt a crime, beſides *Accuſation* and *Preſentment*: therein is alſo conteined an anſwere to a ſuppoſed rule: and declared how from *Generall* they deſcend to *Speciall enquiry*: and that beſides thoſe two, either *à Fame*; or *Clamoſa inſinuatio*; or *Priuate Iudiciall Denunciation*; or *Canoniall Denunciation*, or *Indicia*; or taking with the maner: or other *Notoriety* of the fact: or appeachment by ſome of the complices: or colluſion of the Accuſer: or the not obiecting in due time, that euery of theſe do want: or when the *Enquiry* tendeth but to a *Spirituall* puniſhment, may ſeuerally any of them ſerue to warrant ſuch *Enquiry*: with ſome obſeruations, touching the nature of moſt of theſe. *Chap.* 7.

That to proceed ſometimes againſt an offence, otherwiſe then vpon an *Accuſation* *Chap.* 8.

cuſation or *Preſentment*: or then vpon an *Appeale* or *Enditement* (which two, at the *Common* law haue reſpectiue correſpondence vnto the two former) is no *diuers*, much leſſe any *contrary* or *repugnant* courſe to the lawes, ſtatutes, and cuſtomes of this Realme: this is prooued by Common law, ſtatutes, and practice, in proceeding *informatiue*, and *Punitiue*: with anſwere to certeine obiections made to the contrary.

Chap. 9. How the ſecond opinion (here to be treated of) is: that no lay perſon may be cited *of office*, in any cauſe but *teſtamentary* or *matrimoniall*: and that the drift of that opinion is againſt proceeding *of office* in matters *criminall*: the neceſſary vſe and equity of proceeding (ſometimes) criminally, *by the Iudges office*, in courts both Temporall and Eccleſiaſticall.

Chap. 10. Conteineth an anſwere to ſome further obiections, made againſt the conueniency and reaſonableneſſe of proceeding againſt crimes *of office*.

Chap. 11. That the lawes of the Realme do vſe *Enquiries* and proceedings *ex officio*; that they allow it in courts Eccleſiaſticall: with anſwere to ſome obiections, that are made to the contrary.

Chap. 12. Is ſet downe a replie to the *Note-gatherers* anſwers, giuen to certeine reaſons that haue bene made long agone, for to ſhew the like courſe to be alſo practiſed in *Temporall* courts: and an anſwere to his reaſons brought to proue, that in proceeding *of office*, there is ſome contrariety vnto the lawes of *England*.

Chap. 13. That the *Enquiry ex officio* againſt crimes, is allowed both in *Ciuill* or Temporall courts, and in *Eccleſiaſticall* alſo, by the two lawes *Canon* and *Ciuill*.

Chap. 14. Conteineth an anſwere to ſuch obiections, as vpon the *Ciuill* or *Canon* lawes, are brought againſt all proceedings of office in cauſes *Criminall*, by the *Treatiſer* and the *Note-gatherer*.

Chap. 15. *Enquiry* and proceeding *of office* without an accuſer, and grounded vpon ſome other of the meanes afore prooued ſufficient to enter into ſuch *Enquiry*, is approoued by ſundry examples of *Scripture*.

Chap. 16. An anſwere is made to ſuch obiections, as out of *Scripture* or Eccleſiaſticall writers be made, againſt *criminall* proceeding *of office*; by the *Note-gatherer* and others.

THE

THE SECOND PART of the Apologie publiſhed in defence of ſundrie proceedings by Iuriſdiction Eccleſiaſticall.

CHAP. I.

Containing a diſtinction of offences, and ſeuerall kindes and ends in puniſhing them, with the neceſſitie of puniſhments.

ALl the controuerſies remaining to bee handled in either of the two partes enſuing, doe reſt (chieflie) about the maner of diſcouering of ſuch crimes as are puniſhable by eccleſiaſticall Iuriſdiction. And becauſe many bee talkers of theſe matters, who vnderſtand but litle the true nature of them; therefore to giue light vnto the whole diſputation, & to make it appeare to be a matter of no ſmall conſequence, but much to be ſtood vpon; before I proceed further, I mind to touch ſome neceſſarie points ſeruing for the better vnderſtanding of all proceedings againſt crimes. And firſt of the diuerſitie of faults in generall, then the ſeuerall kindes of puniſhment of them, and the ends of ſuch puniſhing, and of the neceſſitie of puniſhing them: whereupon (by conſequence) dependeth a neceſſitie alſo to haue them firſt diſcouered.

All [1] faults are done either by *committing*; as where in action we doe that which is euill, or forbidden, called properly *Peccatum*, a ſinne, a crime and offence: or elſe by *omitting* and leauing vndone, ſome thing that we ought to do, called *Delictum, à delinquendo*, a default, negligence or contempt. For *to him that knoweth how to do well, and doeth it not, to him it is ſinne*, ſaieth S. [2] *Iames*. And yet theſe two be often [3] confounded together, and the one is taken for the other in ſundry writers.

[1] Gl. in c. peccatum de reg. Iur. in 6. gl. in c. ſi peccatum. diſt. 1. de pœnit. Auguſt. in quæſt. in Leuiticum.

[2] Iacob c. 4. v. 17.

[3] c. d. ſi peccatum.

Of both theſe ſortes, ſome there bee which (by the Ciuill lawes) are called *Crimina ordinaria*. Such [4] as bee knowen by a peculiar name, and haue in lawe a certaine penaltie expreſſed

[4] L. 3. § pœna ff. de crim. ſtellionatus.

for the offenders in them, by ſpeciall ſet Magiſtrates thereunto appointed, in which reſpect they are alſo called *Crimina legitima.* And all other be *Crimina extraordinaria,* ſo called, either becauſe they were committed vncertainelie to ſome, as occaſions fell out, or for that they haue no peculiar and proper name in lawe, or elſe no certaine puniſhment determinately appointed (by lawe) for thoſe who offend in them; and moſt of them are therefore for the varietie of them (vpon the great varietie of ſpots which be in a certaine beaſt named [1]*Stellio*) termed in that lawe *Crimina Stellionatus:* and may be engliſhed by the general terme of *miſdemeanors:* and ſuch be many of theſe crimes which vſually are enquired of and examined in the *Starre-chamber.*

[1] Plinius,

Of animaduerſions or chaſtiſements exerciſed againſt offenders for either of theſe kindes of faults: [2] ſome be by word onely, and ſome be by deed. Of thoſe which be by word alone, (which we may Engliſh *Aduertiſements*) the one is ſignificantly by the *Grecians* termed νουθεσία admonition, and the other ἐπιτίμησις rebuke or reproofe.

[2] Aul. Gellius, lib. 6. c. 14.

The end of thoſe animaduerſions or chaſtiſements which conſiſt in words, is referred onely to the reformation & amendment of him, vpon whom they are vſed, by making him ſorowfull for it, & more circumſpect & carefull how he carieth himſelfe in the like afterward, and thereby is a man ſaid to be won by another.

The puniſhments which be inflicted in deed and not in word onely, are in the Greeke tongue very aptly diſtinguiſhed being of three ſeuerall ſorts, according to the ſeuerall ends vnto which they are referred. For euery actual puniſhment and penaltie is either κόλασις τιμωρία or παιδεία ἐνεργεσ. Κόλασις, the firſt of actual puniſhments (as *Ariſtotle* the moſt exact obſeruer of the proprietie both of words & matters [3] noteth) is ἕνεκα τοῦ πάσχοντος: it is ſuch puniſhment, as eſpecially aimeth at his bettering, vpon whom it is inflicted, being a puniſhmẽt tempered with mercie. For [4] it is whẽ the partie is in deed puniſhed as an offender, yet the rigour of the penaltie is ſpared, & he cõmiſerated and pitied as a man, and therefore apt inough to offend through humane frailtie. The end of the ſecond ſort of actual puniſhmẽts called τιμωρία ἐστιν ἕνεκα τοῦ ποιοῦντος, ἵνα ἀποτιμηθῇ: that is to ſay, is done for his cauſe that proſecuteth it, or is grieued; to the intent there may be ſome ſatiſfaction.

[3] Ariſtot. 1. Rhethor.

[4] c. duo. 33. q. 4. c. fraternitas. 12. q. 2. c. qui ſincera, & c. diſciplina, diſt. 45.

This

This may happen in two ſeuerall ſorts. *viz.* either for the preſeruing or reteining the dignitie of the [1] law, or of the [2] magiſtrate happening to be violated (*non enim licet impunè leges irridere tranſgrediendo*) as by fine or ſuch like: or els for the contentment of ſome priuate perſon, that hath receiued iniury by ſuch offence; which in the French lawes is called *Amende honorable*; and with vs in *England* are either dammages againſt him (as is in actions of the caſe) or els the offenders publik acknowledgement of the fault.

[1] L. 1. & 2. ff. de legibus.
[2] L. obſeruandũ. ff. de offic. Præf.

The end whereunto the third ſort of actuall puniſhment, called παράδειγμα, looketh, is eſpecially for the example of others: and may be Engliſhed an Exemplarie puniſhment: being vſually inflicted for more heinous crimes. *Plato* [3] affirmeth of this, ἄλλοις γένεσι, ἵνα ἄλλοι ἰδόντες πάσχοντα, φοβούμενοι βελτίους γίνωνται. It is (ſaith he) done for others, that they who beholde the puniſhment, may at leaſt for terrour thereof, become better and amend. And elſewhere in the ſame booke he ſaith to this effect, *It is required, that euery one which is duely puniſhed, be either himſelfe reformed, and made better thereby, or to be an example vnto others to reforme themſelues, at the leaſt for feare of like puniſhment.* To which purpoſe the [4] *Greeke Oratour* alſo hath a like ſentence of this matter.

[3] Plato in Gorgia.

Plato in his [5] bookes of lawes aſſigneth one other end of actuall and exemplarie puniſhment: which is, that they are alſo inflicted in grieuous offences, vpon a very deteſtation and abhorring of the crime. For which cauſe euen brute beaſtes, yea and ſometimes inſenſible creatures alſo, are (in a ſort) puniſhed; by whoſe occaſion ſome heinous deede happeneth. Of brute beaſtes ſlaine in this reſpect, wee haue example in Gods [6] owne law. The *Romanes* did of purpoſe nouriſh vp continually dogs in their *Capitoll*, to giue warning of any ſecret approch by night; and when the olde *Gaules* ſacking *Rome*, had almoſt ſecretly ſurpriſed the *Capitoll* alſo: becauſe the dogges at that time did not barke to giue warning, they had their legges broken, and in memorie of a deteſtation [7] heereof, ſome dogges euery yeere afterward were put to a kinde of puniſhment. for certeine were yerely ſplitted aliue vpon a twiforked ſtake made of elder-tree, and ſet vp in that ſort publikely, betwixt the Temples of *Iuuentus* and *Sumanus* in *Rome*.

[4] Demoſth. contra Neœram.
[5] Plato 9. de legibus.
[6] Leu. 20. V. 15. & 16. Ioſeph. lib. 4. antiquit. c. fin.
[7] Liuius lib. 7. Plin. lib. 19. c. 3. & 4. & lib. 1. cap. 22.

[1] Æschines contra Ctesiphontem.

And we reade,[1] that amongs the *Athenians*, insensible creatures, as stones, trees, yron, and such like (which by their falling had casually occasioned the death of any man) were solemnely, as it were, banished from thence, and remooued from the common vse and sight of men. The[2] *Ciuill* lawes do appoint the very houses to be ouerthrowen where forging of mony hath bene vsed. And vpon the same groundes doth the *Common law* of this Realme, giue *Deodands* to the Queene, as thinges accursed, and to be either (at her Highnesse pleasure) destroyed, or bestowed vpon the poore: and the houses of attainted persons in treasons, to the entent to haue them demolished, and the trees about them to be rooted vp; and so in this behalfe is also the law in *France*, yet in frequent practices. All which tend to signifie, in what detestation & abhomination such enormities are to be had; and that men, who are endued with reason, may by such examples of law be admonished, what punishment more iustly abideth them, if they commit the same for which euen brute beastes and insensible thinges are so duely, as it were, punished. For either it doth, or at least wise ought to worke this effect in men. In which respect *Aristotle*[3] saith, that punishment is a remedie or medicine to be vsed against faults. And so[4] *Cassiodorus* grauely writeth: *Remedium est contra peccatum, accelerata correctio.* Quicke punishment of sinne, giues a remedie against sinne. For all crimes and offences be (in truth) but as so many maladies and distemperatures in the body of the Church and Common weale; which if they be tolerated to grow (without restraint & coercion of lawes) will quickly spread like a cancker, either to the destruction, or to the great and apparant danger of both: so that the necessity of punishments and penalties, by the very endes vnto which they are referred, may sufficiently be thus approoued vnto vs.

[2] L. 1. C. de falsa moneta.

[3] Arist. 1. Rhet. ad Theod. c. 14.

[4] Lib. 3. Var. epist. 14.

The necessarie vse of them might be further enlarged and enforced also, by the consideration of sundry, who are interessed in this behalfe. And first in respect of the Magistrate himselfe: for it is said, *Non*[5] *caret scrupulo societatis occultæ qui manifesto facinori desinit obuiare.* He that list not to oppose himselfe against a crime manifested vnto him, may iustly be had in iealousie himselfe, that hee is a partaker with the offender. And againe

[5] c. dilecto. de sent. excomm. in. 6.

[1] *Charitas*

[1] *Charitas non eſt ſed languor, vbi mali mores digna pœna non caſtigantur.* It is not charitie but faintneſſe, to be remiſſe in puniſhing offences. And of ſuch as haue authoritie to puniſh offenders, it is ſaid, [2] *Si illos negligant & perire permittant, iſta potiùs falſa manſuetudo eſt crudelitas.* And againe, *Error cui non reſiſtitur approbatur.* But of that Magiſtrate which puniſheth offenders, it is thus ſaid, [3] *Qui emendat verbere, in quem poteſtas datur, vel coërcet aliqua diſciplina &c. eleemoſynam facit, quia miſericordiam præſtat.* To an offender himſelfe it is behouefull, that hee may be recalled thereby from his wicked courſe. for [4] *malum cùm perſeuerat, augetur:* and [5] *tanto ſunt graniora peccata, quanto diutiùs animam detinent illigatam.* Therefore [6] *non corripere malos eſt eos occidere. Et conſuetudo peccandi tollit ſenſum peccati.*

1 Auguſt. in ep. Ioan. tract. 7.

2 Aug. epiſt. 50. ad Bonif. c. error. diſt. 83.

3 Aug. in Enchirid. cap. 72.

4 Caſſiod. lib. 3. Var. epiſt. 14.

5 c. cum tanto. de conſuetudine.

6 Iuo. lib. 8.

In reſpect of others alſo, that might take encouragement to goe on in wickedneſſe, or to commit the like, puniſhments be very neceſſarie. For in regard heereof, *Tullie* ſaith, [7] *Impunitatis ſpes magna peccandi illecebra.* And in law it is ſaid thus: [8] *Iuſſum eſt rectoribus prouinciarum, ne ſinant crimina coaleſcere, ſed puniant, ne facilitas veniæ incentiuum tribuat delinquendi.* To like purpoſe *Ambroſe* [9] writeth: *Nonne etiam cum vni indulget indigno, ad prolapſionis contagium prouocat vniuerſos?* And therefore it is grauely [10] ſaid by another: *Quæ eſt iſta miſericordia, qua bonitas, vni parcere, & omnes in diſcrimen adducere?*

7 Pro Milone.

8 c. vt clericorum. § 1. de vita & hon. cler.

9 Serm. 8. in pſal. 118. V. 2.

10 c. ſed illud. diſt. 45.

Laſtly in reſpect of the whole Church and Common wealth, puniſhments are moſt needfull. Examples are plentiful in Scripture, where for the ſinne of a few, whole armies and ſocieties haue bene puniſhed. This we may ſee in [11] *Achan*, whoſe ſtealing of the accurſed garment, &c. was a cauſe of the ouerthrow of *Iſrael* in battell. So for [12] the ſinne of *Ely* and his ſonnes many thouſands of *Iſrael* were ſlaine by the *Philiſtims*. And to like effect [13] *Salomon* ſpeaketh, when he giueth charge to kill *Ioab*. *Smite him,* (ſaith he) *that thou mayſt take away the bloud which Ioab ſhedde cauſeleſſe, from me, and the houſe of my father.* And [14] for *Ionas* his diſobedience, the whole ſhippe was in danger to be wrecked. Therefore an ancient Father [15] ſaith, *That as one diſeaſed ſheepe infecteth the whole flocke, ſo by the fornication or other crime of ſome one perſon, oftentimes the whole people is holden defiled.*

11 Ioſua. 7.

12 1. Sam. c. 4.

13 1. Reg. c. 2.

14 Ion. c. 1.

15 c. ſed illud. diſt. 45.

Vpon theſe and ſuch like conſiderations, the light of nature did

did teach euen heathen men thus: [1] *Interest semper Reipub. delicta puniri.* And [2] *pœnas ob maleficia solui, magna ratio suadet,* the whole common wealth hath an especiall and continuall interest, and great reason also mooueth to haue wickednesse punished.

[1] l. ita vulneratus. ff. ad l. Aquil.
[2] l. 7. § finali. ff. de fideiuss.

If then vpon so many & weightie causes it be needful to haue crimes punished, can it be denied but that all good means are to be vsed, to bring them to discouerie and conuiction, which must needs goe before the punishment of them? [3] *Multis grassantibus exemplo opus est,* saieth the lawe: where there be many transgressers, it is needefull to haue some made an example to the rest: and therefore [4] *Peccata nocentium expedit esse nota:* it is most expedient to haue euill mens lewdenesse made knowen and reueiled.

[3] l. aut facta. ff. de pœnis.
[4] l. eum qui. ff. de iniuijs.

CHAP. II.

There in is shewed how there are two sortes of prosecution of Crimes and Offences; viz. *by a* Partie *and of* Office; *and the practise of them in Scripture, and in the seuerall Courtes of this Realme declared.*

NOw, the meanes to bring any Crime and Offence into question before Iudges and Superiours in authoritie, must needs be, and so by all lawes, and in all common weales generallie (that I haue read of) are either by prosecution of some partie, or else vpon the *Office* of the Iudge: the [5] *Office* of the Iudge is occasioned, and as it were set on worke, either vpon relation made vnto him by some other, or vpon his owne meere motion, without any relation from others, which may happen, as when an outrage or misdemeanor is committed in his sight, or in some publike presence, where he then happeneth to be.

[5] Iul. Cla. lib. 5. § fin. q. 3.

In the law of God and examples of holy Scripture, I do not call to my slender remembrance where any criminall matters be appointed & commanded to be prosecuted by a *Partie:* & but in very few places, where any haue bene vsed, who might properly be termed an *Accuser*, or a *Partie.* For albeit in sundry places of Scripture we finde *Accusers* mentioned; yet in many of them, such

ſuch cannot be *accuſors* or parties (properly and ſtrictly ſo termed) but onely in a very large ſignification. becauſe their teſtimonies were receiued againſt thoſe, whom they denounced of crimes. For where a man is partie himſelfe, making it as it were his owne cauſe, and not the Iudges office; there it is no reaſon, that his owne teſtimony ſhould be admitted. [1] *Quia teſtimonium in propria cauſa vel quaſi propria, non valet.* And it may then be ſaid to be a mans owne cauſe; whereof he may reape benefit or dammage. But more (God willing) ſhalbe ſpoken hereof, in his proper place.

[1] L. 1. § in propria ff. Quando appell.

Touching bringing crimes into queſtion in Temporal Courts of this Realme, (that deale in matters ciuill or criminall) it is to be firſt remembred, that theſe Courts be of two ſorts: ſome vſing the *Queenes* immediate auctoritie, yet the ſame ſtill actually being in her Highnes &c; as all the Courts at *Weſtminſter*: Others vſing but a kinde of mediate auctoritie, deriued from the *Crowne*; yet by her *Graunt* made (in ſome ſort) their owne, as deriued downe thereby vnto them. For ſundry ſubiects, albeit they haue but a deriued power from the *Queene* (as from whome through the dominions of this Crowne, all iuſtice, and iuriſdiction to adminiſter it, whether *Temporall*, or *Eccleſiaſticall*, doth originally flowe:) yet do not their *Proceſſes* runne in the *Queenes* name, nor her ſeale is vſed to them.

Of ſuch *Temporall* Courts as ſit but by ſuch a mediate and deriued auctoritie from the *Queene* vnto them, and therefore vſe not her Seale or name; ſome were in times paſt eſtabliſhed for cauſes *Martiall*, as the [2] *Conſtables* of *England*, and the Earle *Marſhall* his Courts (whereof I haue very ſmall experience:) and ſome for matters perteyning to the *Peace*. And of theſe laſt, ſome be for *cauſes* growing within the land, as Courts of *Counties Palantine*, of cities and townes *corporate*, Sherifs turnes, and Court-Leets, or views of *Francke-pledge*: and others be for cauſes *Marine*, as all the Courts of the *Admiraltie*.

[2] Ric. 2. cap.

In temporal courts of counties *Palantine*, in courts of townes and cities corporate, ſauing where ſome ſpeciall cuſtome preuaileth (as in *London* many) in Sherifs turnes and in Leetes, the courſe of the common Lawe is (for the moſt part) obſerued. In *Admiral courts*, the order of the *Ciuill lawe* of the *Romanes* (be-

cauſe it is the written Common law of moſt nations not barbarous, with whom wee haue to deale) is eſpecially vſed; ſauing where by *Statute* or *Cuſtome*, it is otherwiſe directed.

Of ſuch courts as exerciſe the Queenes immediate autoritie, ſome haue no letters Patents of Commiſſion to direct them; as the *Parlement*, which is called, and ſitteth by the *Queenes* onely writ: the *Chauncerie*, from whence all originall writs do come; and yet the L. *Chauncellour* or L. *Keeper* haue no Commiſſion by letters Patents, but receiue their authority by deliuery vnto them of the *great Seale*, as I am infourmed: the *Starre-Chamber* (eſtabliſhed of the Queenes priuie Counſell, and ſome others to be called) partly by *præſcription*, and partly by *Statute*: the court of *Requeſts* by *cuſtome* and *præſcription*: And the Counſaile in the Principalitie and *Marches* of *Wales*, auctoriſed by *Act* of *Parliament* vnto ſuch, and in ſuch maner, as her Maieſtie (by inſtructions vnder her Roial hand-writing) ſhal from time to time direct.

But thoſe Courtes *Temporall*, which ſit by Commiſſion and letters Patents for exerciſing (in ſtead of her Highneſſe) the Queenes owne and immediate autoritie, are either ſuch, as be vſually now holden at *Weſtminſter*, as the Courts of the *Queens Bench*, the *common Pleas*, the *Exchequer*, and the Court of *Wards* and *Liueries*: or in other places of the Realme abroad, as Courts of *Generall Aſſiſes*, *Niſi prius*, *Gaole deliuerie*, *Seſſions of the Peace*, the Counſell eſtabliſhed in the North parts, the Court of *Stannery* in *Deuonſhire* and *Cornewall*, and (as I haue bene infourmed) the Court for triall of life and death at *Haliſax*, and ſuch like.

I know, that by ſpeach, and by vſe alſo (in ſundry mens writings) touching the aforenamed Courts; ſuch only (as it were by a kinde of appropriation) be moſt vſually called Courts of the *Common lawe*, wherein matters of *fact*, touching *hereditaments*, *contracts*, or *miſdemeanours* be tried by a Iurie of twelue men, becauſe this triall is more frequent then any other. But yet we are not to thinke, that none but theſe may truely ſo be named, as though the other were contrary to the Lawe Common; ſeeing they be alſo allowed by the *Lawes*, *Statutes*, or *Cuſtomes* of this Realme, aſwell as thoſe which proceede to triall by Iuries.

In the Courts afore ſpecified that proceede to the triall of crimes, by Iuries of twelue; if there be any *Appellour*, as of mur-

der, robberie, or ſuch like; then may the *proſecution* moſt properly and truely be ſaid to be done by an *Accuſer*, and at the *proſecution of a partie*. If it be for the *Queene*, whether it be by way of *enditement*, and be preferred by the Iudges themſelues, or by the *Queenes* Atturney generall, or by ſome priuate perſon; or be by way of *Information* put vp againſt ſome offence made *pœnall*, and not *capitall*, (and this either by the Atturney generall, or by ſome other perſon) then all ſuch proceedings, are in trueth done *ex officio Iudicum*: And this, either of meere and *entire office*, as when the Iudge himſelfe preferreth it; or *ex officio promoto*, as when it is firſt related and preferred vp vnto him, and proſecuted by any other. But in this laſt caſe, there is a kinde of *mixt* proceeding betwixt both. And albeit the Informer do proſecute partly for himſelfe; yet is it for the *Queene* alſo whoſe the Court is, and ſo may be truly ſaid to be *of office*.

This appeareth plainely, in that the *Appeller* (becauſe he is a meere partie) is not ſo fauoured, aſſiſted, and priuileged in many reſpects; as when the *proſecution* is inſtituted *of Office* for the *Queene*. For the *Appellee* may put it to triall of battell with the *Appellour*, which he cannot doe vpon *enditement*, at the ſuite of the *Queene*. Likewiſe, whoſoeuer doth preferre *the enditement*, or *information*, though the defendant happen to be acquited: yet the preferrer payeth neither coſts, nor dammages, nor is ſubiect to any action in that behalfe, as an *Accuſer* and partie both is, and ought to be. But if the defendant be conuicted (ſo the crime be not *capitall*, but *fineable*:) then is the *fine*, if it be impoſed by the Court, to come wholly to the Queene: If by *pœnall* ſtatute; then (moſt commonly) it accrueth (by diſpoſition thereof) partly to her Highneſſe, and partly to ſuch priuate perſon as *informeth*. And the *enditements* be termed vpon their beginning, *Enquiries* or *Inquiſitions*, which are alwayes *ex officio*.

Now theſe and ſuch like, be notes and markes, whereby you may diſcerne proceedings of theſe Courtes in *criminall* cauſes proſecuted by an *Accuſour* or *partie*, from that which is done vpon the *office* of the Court: for theſe two proſecutions doe differ in the end; and they differ alſo in certeine priuileged points, which that *of Office* hath, aboue that which is by a *partie*. In the end, thus they differ; becauſe proſecution *of Office* aimeth at

publicam vindictam, a publique punishment, whether *pecuniarie*, to accrue to the Queene, or *corporall*. In deed, in all *capitall* causes, *vindicta* is (in truth) *publique*, and *exemplaris*, albeit both the *Appellour*, onely doe prosecute (perhaps after the Queene haue pardoned it) and that he also seeke nothing els, but priuate reuenge for his owne iniurie receiued rather then for an example to be made of the offender, or for the Common weales satisfaction, and contentment. Of the contrary side, prosecution in these Courtes of an offence criminall (being not capitall) by an *Accuser* or *partie*, propoundeth (for the most part) but a *Ciuill end*, that is, some satisfaction and amends to be made vnto the complainant damaged: as in actions of sundry trespasses, in actions of the case &c. And then doe the *Ciuilians* terme this *Causa criminalis ciuiliter*; and the former, *Causa criminalis criminaliter mota*.

Besides such difference in the end, there be also some priuileges that are granted to the one course of proceeding, which are denied to the other; whereby those two kindes of prosecution doe differ. As that in proceeding of *Office* for the Queene (as was touched afore) the defendant may not gage battell against the preferrer, as he may doe against the *Appellour*: neither hath any defendant in an *enditement* or *information* (though he be acquited) any costs allowed, when the suite is for the Queene, as he both hath and ought (in iustice) to haue, when the suite against him, is onely prosecuted by a priuate and wrongfull *Accuser*; that was not able to iustifie his declaration (as wee may terme it) *accusatorie*, of such priuate offence or misdemeanour, whereupon he sued him.

Now let vs consider also how those Courtes which haue none vsuall triall by *Iuries*, doe proceed against offences. First the high Court of *Parliament* hath no great vse (that I know) of dealing against *Offences*: but such as happen to be committed either by some member of the house, during the time of *Parliament*; or against the liberties and orders of that Court. In both which cases they proceed to examination of them, either vpon the *Notoriety of the fact* happening among them, or vpon credible *relation* of some; but wholly without any *Accuser* or *partie* taking vpon him the proofe thereof, with any hazzard, of

so

ſo much as Charges for wrongfull vexation; if it ſhould ſo fall out to be accounted. And therefore ſuch proceeding, is alſo of meere *Office*.

In the *Starre Chamber*, onely crimes and miſdemeanours bee inquired of; but eſpecially thoſe, which I called afore *Extraordinaria Crimina*: viz. ſuch as haue either no certaine name, or at leaſt no ſet and determinate puniſhment, by Lawe appointed; and may not be puniſhed there, by loſſe of life or of limme; but either by *Fine*, by open ſhame and infamie, by impriſonment, by nayling or cutting of eares, or deforming the face, by baniſhing from ſome certaine place of the Realme, or foorth of all the Queenes dominions, or vnto a certaine place abroad; or by condemnation vnto the *Galleis* perpetually, or for a time, &c.

The miſdemeanours puniſhable in the *Starre Chamber*, bee brought thither into queſtion for the Queene onely, either by her Maieſties *Attorney generall* (and that is by bill of information, or *Ore tenus*) or els be brought vpon bill preferred by ſome priuate perſon, that is grieued. In all which Caſes, albeit there be found one which doth proſecute: yet can he not truely be called an *Accuſour*, or a partie; for the reaſons before alleaged, viz. of the end propounded, which is *publica vindicta*; and for other great aſſiſtance and priuiledge, which that Court giueth to the proſecutor againſt the def. in reſpect that it is for the Queene.

And namelie that he is to anſwere not onely to the *Bill* vpon his oath, but alſo to *Interrogatories* more particularly criminall then the Bill, and the *Interrogatories* without counſell: which (in trueth) therefore needeth not, becauſe they are brieflie drawen article-wiſe, and concerne but matters of fact, within his owne knowledge as is entended. Vpon all which matter it followeth, that the proſecutour there is but as a relatour, partly to ſtirre vp, and partly to eaſe *the office* of that Court, by furniſhing it with proofes.

Neuertheleſſe I am not ignorant, that ſometimes, when it appeareth manifeſtlie to their Lordſhips: that the plaintife (being ſome priuate perſon) hath calumniouſly, and of malice onely, vexed the def. then ſuch plaintife there, is (and iuſtly alſo may be) condemned in coſtes and damages, for his apparant calumniation and wrongfull moleſtation of the def. Vnto which courſes

of the *Starre Chamber*, I take the Courts of the Queenes Counsell eſtabliſhed in the *Marches* of *Wales*, and in the *North partes*, to bee alſo agreeable in their inquiries and examinations of crimes and miſdemeanors.

In the *Chancerie* and Court of *Requeſts*, (being both Courtes of equitie) if any miſdemeanours or crimes be diduced and laied downe in the Bils (which happeneth very often:) yet are they not *Criminallie* laid, to haue the def. puniſhed for them: but onely *Ciuilly*, to the intent, that the plaintife may haue an amends and priuate ſatiſfaction, as ſhall be deemed to bee equitie. And therefore ſuch proſecution, is not by *Office* of the Court, but onely at the parties ſuite: albeit the *Office* in the *Chancerie* doe thus farre aſſiſt the plaintife, for ſifting out of a trueth; that the def. muſt anſwere, euen to the *Criminall* points of the Bill, vpon his corporall oath: But he may not (in thoſe two Courts) be put to anſwere the plaintifes interrogatories vpon his oath; except the plaintife will be concluded by the def. anſwere vnto them, and ſeeke to make no further prooſes.

But of all the Courts temporall aforeſaid, aſwell thoſe which proceed to the triall of miſdemeanours by *Iurie*, as of others; I thinke this may bee generally affirmed; That when any lewde practice, abuſe, or contempt (not capitall, nor tending to mutilation) is ſuppoſed to be done againſt the Court; there (euen of meere *Office* without any *Accuſation* or proſecution of any partie by Bill) the Iudges of ſuch Courts, doe *Enquire* thereof, by examining and by interrogating euery one that is holden ſuſpected thereof, or to be priuie thereto, vpon their corporall oathes firſt taken. Let thus much then ſuffice for the two ſortes of proſecution, and bringing Crimes into queſtion, by the courſe mentioned in *Scripture*; and by vſe and practice in Temporall courts of this Realme.

* * *

CHAP.

CHAP. III.

Of the ſundry kindes of obiecting Crimes by a partie *mentioned in the* Ciuill *lawe: as by reaſon of a mans publique charge and function: alſo by way of* Exception, Supplication, Cõplaint, Delation, *and* Accuſation. *The true ſignification of the worde* Accuſatio, *his diuers acceptions, definition, and expoſition thereof, with ſome reaſon of the frequencie of* Accuſatio *in Courtes of the* Ciuill *lawes, in former times is alſo declared.*

THe ſame, and none other maner is likewiſe practiſed to bring offences into queſtion by the lawes both Ciuill and Eccleſiaſticall, in ſuch Courtes, as either of thoſe Lawes haue place and vſe: That is to ſay, either by a *partie*, or els by the *Office* of the Iudge.

Crimes in ſuch Courtes may be brought into queſtion before a Iudge, vpon a parties proſecution (whereof we are firſt to ſpeake) two maner of wayes. The one *Commendablie*, the other not ſo *commendablie*. *Commendablie* in two ſortes, either by reaſon of ſome office and charge, or by reaſon of a mans owne neceſſary intereſt. By reaſon of a mans *Office* and duetie, as when *Triumuiri regij*, *Procuratores Fiſci*, *Aduocati regij* (as French writers call them) or (as we ſpeake and practiſe here in *England*) when the Queenes *Atturney generall* (who by duetie is bound thereunto) preferreth *inditement* or *information* againſt ſome ſuſpected criminous perſon, or wrong doer. This hath verie neere affinitie with that *Denunciation* or *Preſentment* (called *Iudiciall*) which is to be ſpoken of hereafter. And albeit there be a kinde of *partie*; yet it is of the nature of proceeding of *Office*, which I alſo touched in the Chapter next precedent.

The *Commendable* proſecution by a *partie* againſt an *Offence*, in reſpect of a mans owne priuate intereſt; is either by way of *Exception* and chalenge, done in his owne neceſſarie defence, and to auoide puniſhment; or *per viam querelæ*, by way of *Complaint* for attayning his right.

Exception is ſometimes taken againſt witneſſes that be brought againſt vs, to this intent onely; that by obiecting and prooving them to be lewde or affectionate perſons, there may no credite be

be giuen to them in their depoſitiõs; and not to haue them puniſhed. And this obiecting of Crimes by way of *Exception*, hath not ỹ force of an *Accuſation*. Or els [1] it is taken (before iſſue ioyned) *againſt him that would accuſe vs, by our obiecting of ſome crime alſo vnto him.* Now if this be done onely to the end to repel him from accuſing; then hath it not the effect of an *Accuſation*, whereby he may be puniſhed (though he be proued guiltie.) But if he that ſo *excepteth*, doe ſet downe the time, place, &c. of ſuch crime obiected againſt his aduerſarie, and doe alſo inſtant the Iudge to condemne him: then ſhall it be proceeded in, as in *Accuſation*, and may be called a *Recrimination*, or *Croſſe-accuſation*, made by the defendant.

[1] l.1.ff.vi.bon. rapt. l.2.ff.de tab. exhib.

The proſecution *per Querelam*, is alſo of two ſortes: the one *extraindiciall, when* [2] *a man oppreſſed, humbly and ciuillie complaineth and expoſtulateth of ſome wrong done vnto him, deſiring remedie, not ſo much to haue the other puniſhed, as that himſelfe may, (by ordinarie courſe of lawe) haue reaſon done him.* This may properly be called *Querimonia*, a ſupplication to the Superior. The other *Querela*, is *Iudiciall*, being a kinde of *Appellation*; [3] and is either done by complaint vnto the ſoueraigne Prince, of ſome wrong done by an high Court (ſuch as *Præfectus Prætorio* kept among the *Romanes*) from which none *Appellation* lieth: or els is a *Complaint* vnto a ſuperiour Iudge, of refuſall, or delay to do iuſtice, by his inferiour Iudge; with vs commonly termed a *double Querele*. Thus much for the moſt commendable ſortes of proſecution of offences, inſtituted by a partie.

[2] l.1 C. Rerum amotarum.

[3] l. Arbitrio. vbi gloſſ. & Bart. ff. qui ſatisdare coguntur.

Of thoſe which be not ſo commendable proſecutions of offences by parties, one is called *Delatio*, being the more odious and baſe; the other is *Accuſatio*, properly ſo termed.

Delatio likewiſe is of two ſorts. The one may be deſcribed to be a [4] ſecret accuſation or imputation of ſome crime againſt any, made vnto a Magiſtrate, by him that is no way particularly intereſſed in the cauſe. Againſt ſuch, was that law [5] of *Conſtantinus* conceiued, whereby it was prouided, *that no priuate perſon ſoould be a delatour, or preferrer vp of crimes*; and *that none ſhould be put vp, without the Aduocate of the finances, or reuennes of the crowne*; whom we call the *Atturney generall*. And of ſuch *Delatours* or *Tale-carriers* was this woorthy ſaying of an Emperour meant:

[4] l.10.§. Qui nomen. ff. de iure patr.

[5] l. pen. C. de Delatorib. lib.10.

Prin-

Princeps, qui delatores non caſtigat, irritat. Privy accuſers & back-biters take encouragement enough from ſuch a Prince, as will but heare, without giuing them any rebuke. Which ſaying, *Suetonius* [1] attributeth to *Domitian*; and *Plinius* [2] vnto *Traian*.

[1] Sueto. in Domit.
[2] Plin. in Panegy. de Traiano.

There is a ſecond ſort of *Delatours* & preferrers vp of crimes, which deale more openly then the former. And we finde alſo in law, two kindes of theſe. The firſt be a kinde of *Calumniatours* or *Sycophants*, [3] that *preferre publikely (yet vnder other mens names and perſons by them ſuborned and excited) ſome criminall matter againſt any perſon.* The other ſort be thoſe, who (for gaine or reward) do in their owne names, preferre vp criminall and pœnall matter againſt others. And of theſe, ſome doe informe of conceiled landes or goods; due and eſcheated to the common treaſure of the Crowne; yet ſuppoſed to be deteyned wronfully, by any others. And theſe by the *Ciuill* lawe [4] are *ſaid to be odious and hated of other men*; becauſe they doe it for no duetie to the Prince or common weale; but vpon a greedie deſire, to enioye to them ſelues, part of the gaine by others loſſe: being (by that law) ſome time a third, and ſometimes a halfe part of that, which they finde (in trueth) to haue bin deteined by wrong, intruded vpon, or vſurped. Others be mentioned there alſo, who preferre informations againſt offenders of ſuch lawes, as do inflict mulctes & pecuniarie penalties for the offence; vpon hope of ſuch gaine, as (by thoſe lawes) is aſſigned to come vnto their ſhare. This kind of *Delators* in this Realme, we call *Infourmers*, or *Promoters*: though their proſecutiō in this Realme do much participate (as afore is ſhewed) with that, which is called *ex Officio promoto*, & in that reſpect, be greatly priuiledged. Among the *Romanes* ſuch were called *Quadruplatores*, becauſe commonly the *fourth part* of the penaltie, was awarded vnto them. So that by like reaſon our *Infourmers* may be called in Latine *Triplatores*, when they haue a third part; and *Duplatores*, when they haue the one halfe, as they haue in this Realme (vpon penall ſtatutes) moſt vſually.

[3] l. noſtris C. de Calumniator.
[4] l. ex varia C. de Delatorib. lib. 10.

In what deteſtation and hatred this kinde of men (though not altogether vnneceſſarie) were had amongs the old *Romanes*, this ſaying of *Quintilian* doth manifeſt. [5] *Ad deferendos reos præmio duci, proximum eſt latrocinio. To be induced for reward or gaine, to preferre criminall matter againſt offenders, is next a kin to robberie.*

[5] Quinct. lib. vlti. cap. 7.

And in deede, *Delatours* were farre more ſtomacked, and maligned, then other *Accuſours*, as may bee gathered by theſe places in the Ciuill lawe. [1] *Wee doe iudge him that accuſeth in ſuch a crime, to deſerue rather rewarde, then to bee called a Delatour.* And againe in another place: [2] *Let not ſuch feare either the name or ſuſpicion of Delatours.*

[1] l. 3. C. de Maleſic.

[2] l. Nulli. in fine. C. de. Epiſ. & Cleric.

The laſt of thoſe wayes, by which a *partie* brings offences into queſtion and diſcuſſing before a Iudge, is *Accuſation.* It is called [3] *Accuſatio ab Ad, & Cauſſa: quia Accuſator quaſi ad cauſam vocat.* There bee other wordes of neere ſignification vnto this, yet not the ſame altogether, as *poſtulare*, when it is vſed with the ablatiue caſe, *Poſtulare aliquem crimine, inſimulare, incuſare*, and ſuch like. But there is a difference noted betwixt this laſt, and *Accuſation*, which is this: *W'e are ſaide (ſaieth* [4] *one) properly incuſare, ſuch as bee our betters, and to accuſe thoſe, that be our equals or inferiours.* But this difference is not much obſerued. [5] This worde *Accuſation* is ſometimes ſo generally taken, that it ſignifieth an *Action* in a Ciuill cauſe; like as, on the contrary ſide, *Action* is taken for *Accuſation. Tullie, pro Milone* nameth it *Actionem Perduellionis.* But moſt properly it is called *Accuſation*, when it is intended in cauſes *Criminall.*

[3] Iſidor. vt in c. forus, de verb. ſignif.

[4] Seruius in prim. Æneid.

[5] l. Qui accuſare. C. de edendo. l. Si maritus. § Si negauer. ff. de adulter.

We reade of *inwarde*, and of *externall, or outwarde Accuſations. Internall Accuſation* is of a mans owne conſcience. Such is the *Accuſation* ſpoken of by *Salomon.* [6] *Hee that is firſt in his owne cauſe, is iuſt:* or as the vulgar Latine tranſlation readeth it, *The iuſt man, is the firſt Accuſer of himſelfe.*

[6] Prouerb. 18. verſ. 17.

Externall, or outward *Accuſation* is either *Priuate*, or *Publike. Priuate* is either betwixt enemies, or betwixt friendes. That *priuate Accuſation* and imputation which is among enemies, is of three ſortes: either ſpitefull vpbraiding, called of the *Grecians* by the generall name [7] of κατηγορία, a worde alſo fitting euery *Accuſation:* or reproche and reuiling called ὀνείδος: or els *Calumniation*; that is, malicious or falſe wreſting of his enemies wordes or actions, to an offenſiue purpoſe.

[7] Plutarch in vita Publicol.

Priuate *Accuſation* of one friend touching another, is nothing els, but a friendly *expoſtulation* with him, that is ſuppoſed not to haue dealt ſinglie or conſiderately, in the courſe of good friend-

ſhip,

ſhip, called αἰτία of the *Grecians*. That *Accuſation* which is *publike*, is either *ciuillie* moued, that is, for priuate amends vnto the partie grieued: or *criminallie*, that is, for ſome publike puniſhment; whether it be κάλασις, τιμωρία, or παιδότριψις. And it is that *Accuſation*, which here we eſpecially treate of.

This *publike Accuſation*, is ſometimes done *ore tenus*; that is *by bare wordes without writing*, which the *Grecians* doe expreſſe alſo by the aforeſaide name of αἰτία. But moſt vſually *publike Accuſation* is made by writing. That, which is conceiued in writing, in a more large ſignification, conteyneth and reacheth euen vnto thoſe preferrings of crimes (afore ſpoken of) that are done by *Exception* or *Chalenge*, by *Complaint*, or by *Delation*. And vnto this *publike Accuſation*, which is of more generall acception, that definition of *Ariſtotle* agreeth: viz. that *it is a publike declaration againſt ſome, of iniuries or crimes committed*. But in the ſtrict and proper ſignification it is taken for that ſolemne *Accuſation* termed by the *Grecians* ἔγκλημα, and alſo ſometimes κατηγορία; when as this latter is not taken generally, but for the moſt eſpeciall kinde thereof onely.

The effect of this *Accuſation*, when the crime declared is proued to bee true, and by arguments conuicted; is called by the *Grecians* ἐλέγχειν that is, [1] (as the *Latines* doe expreſſe it) *arguere*. [1] l. Indicaſſe. ff. de verb. ſignific.

There is alſo another different acception from the former, of the worde *Accuſour*, that is not hitherto touched: which is, when that worde is applied κατηγορικῶς vnto any, that teſtifieth ſome criminall matter againſt another. And in this ſignification, wee doe finde it very [2] vſually taken in holy *Scripture*, as ſhall afterwarde more fully appeare. So in ſundry ſtatutes of this Realme, as namely in theſe wordes of a ſtatute; viz. *duely accuſed or detected by two lawfull witneſſes*: 25. Hen. 8. cap. 14. and in ſuch other ſtatutes; whereby is required, that the *Accuſours* be brought face to face, againſt the priſoner: meaning thereby ſuch witneſſes as are to giue euidence (vpon their oathes) againſt the partie conuented. Hereofwe haue diuers examples, and namely in theſe wordes of a ſtatute, [3] *That no perſon ſhalbe conuicted &c. or ſuffer &c. vnleſſe the ſame offendour &c. be accuſed by two ſufficient & lawfull witneſſes, as ſhal willingly without violence cõfeſſe the ſame.* [2] Vide infrà, cap. 15. [3] 1. Ed. 6. ca. 12. in fine.

Where the witneſſes ſayings are called *Accuſation*, & their *Depoſitions, Confeſſion*. Likewiſe in the ſame Kings dayes, where it is thus prouided, [1] *That no perſon ſhalbe conuicted &c. for any treaſons &c. that nowe be, or hereafter ſhalbe &c. vnleſſe the ſame offendour be thereof accuſed by two Lawfull accuſers: which ſaide accuſers at the time of the arraignment of the partie accuſed (if they be then liuing) ſhalbe brought in perſon before the partie ſo accuſed, and auowe and mainteyne that, that they haue to ſay againſt the partie, to proue him guiltie of the Treaſons or Offences, conteyned in the Bill of inditement.* So that here, thoſe that giue euidence to prooue the matter of the enditement (which muſt needes be the witneſſes) are called *Accuſers*. which termein theſe & like ſtatutes, ſeemeth to haue bin borrowed from the cõmon ſpeach of men (who often vſe to ſay thus; *Who is able to accuſe me of ſuch or ſuch things?* meaning, to teſtifie againſt them) rather then that the true proprietie of the worde was there followed. For *Iuſtice Brooke* in his Abridgement teſtifieth, [2] *That the common triall at the Common lawe is by Iurie and witneſſes, and not by Accuſers.* So that albeit *witneſſes* touching offences (by ſome ſtatutes and by vſuall ſpeeche of the vulgar ſort) be termed *Accuſers:* yet (by his opinion) they doe (in very deede) differ much, in that the one is (as he ſaith) the triall of the Common lawe, but not the other. The true difference betwixt them he there prooueth alſo out of the Ciuill lawe; vpon relation made vnto him, by a Doctour in that facultie; and willeth it to be noted as a ſaying, which hee well alloweth. *By the Ciuill lawe* (ſayeth [3] he) *Accuſers be as parties, and not as witneſſes. For witneſſes ought to bee indifferent, and not to come till they be called. But accuſers doe offer themſelues to accuſe. For it is a good chalenge of a witneſſe to ſay; that hee was one of his accuſers. Quod nota.*

1 5. & 6. Edw. 6. cap. 11.

2 Tit. Corone, nu. 220.

3 Brooke ibid.

Nowe howe vnreaſonable were it, to admitte the teſtimonie of a partie in his owne cauſe? So that by the Ciuill lawe (by which this proſecution is moſt properly handled,) *Accuſation* (truely ſo called) is defined to bee, *Ius vlciſcendi ſolenni & pœnali iudicio, pœnas ac delicta: A right which the lawe yeeldeth to any of proſecuting crimes and offences for reuenge and puniſhment, by publique and ſolemne iudgement.*

For the explaning wherof, we haue to note in this behalfe that crimes

crimes or offences be of two ſorts. Some be *priuate*, whereby a cõmon perſon onely, and no publique perſon, nor the ſtate of the Common wealth (otherwiſe then by conſequence) is offended. And this kinde cannot be proſecuted, but by the very party grieued, or by ſome of his kinne and propinquitie. And it may be vrged, either to the end of ciuil reuenge; that is, amends pecuniarie, called *actio vel accuſatio criminalis ciuiliter*: or to the ende of a publique puniſhment, called *accuſatio criminalis, criminaliter mota*. The crimes that be *publique*, are thoſe that be heinous, as more deeply touching the ſtate of the whole cõmon wealth and publique peace, then the former; and therefore may be proſecuted by any man, being called *populares actiones, quia competunt cuilibet de populo*: [1] *ſauing that certaine perſons, for eſpeciall cauſes, are by lawe from accuſation to be repelled.*

[1] l. de his. C. qui accuſare non poſſunt.

Vnder the word of *ſolemne iudgement*, be three things conteined, and vnderſtood, that ſuch an *Accuſour* muſt vndergoe. Firſt [2] *he muſt preſent the name of the accuſed perſon in publique iudgement, as an offender in ſuch a ſpeciall crime: Then muſt he ſubſcribe his owne name*, whereby he is ſaid *vinculum inſcriptionis accipere: And he muſt alſo be committed vnto the like cuſtodie and ward, that the Accuſed (in regard of the qualitie of the fault, and dignitie of the Accuſour) is to ſuſteine, vntill the ſuite be finiſhed.* By this bande of *Inſcription* or *Subſcription*, the [3] *Accuſour bindeth himſelfe to proſecute the ſute: and profeſſeth withall, that if he proue not the Crime, which he layeth againſt the Accuſed; then he himſelfe will and ſhall endure the ſame puniſhment; that ſuch crime* (when it is in deede committed) *doth deſerue.*

[2] l. finali. C. de accuſ.

[3] l. qui crimen. C. qui accuſare non poſſunt.

How vnuſuall ſoeuer this be among vs, or how ſeuere this courſe of puniſhment may ſeeme vnto ſome: yet do we find the equitie of it in Scripture, and that it is to be inflicted vpon ſuch, that calumniouſly impute falſe crimes vnto others. *If vpon diligent inquiſition* (ſaith [4] the Lord) *it be found by the Iudges, that the witneſſe is falſe, and hath giuen falſe witneſſe againſt his brother; then ſhall ye doe vnto him, as he had thought to doe vnto his brother, &c. Thine eye ſhall haue no compaſſion, but life for life, eye for eye, toothe for toothe, hand for hand, foote for foote.* How much more then vpon a wilfull *Accuſer*, which calumniouſly ſeeketh for reuenge ſake, vpon an vntrue *Accuſation* ſo knowen vnto himſelfe, to

[4] Deut. 19. V. 16. & ſequent.

[1] Dan.cap.13. bring another man into ſo deepe danger? An [1]example here of we haue, in the ſtoning of the two *Elders*, that calumniouſly accuſed or witneſſed againſt *Suſanna*. This *pœna talionis*, or retaliation, is alſo allowed by ſundrie eccleſiaſticall writers in like caſe: as by [2] *Eutychianus*, and [3] *Sixtus*, auncient Biſhops of *Rome*. For witneſſes be ſometimes compelled to beare witneſſe, who perhaps may ſlippe by affection, inconſideration, or want of remembrance: which is therefore more excuſable in them, then in *Accuſers*; inſomuch as theſe *Accuſers* come willingly, without any excitation of others, to doe it. For *nemo inuitus agere vel* [4] *accuſare compellitur: No man is compelled to bring an Action or an Accuſation*, ſauing in eſpecial caſes, as [5] in *Hereſie*. *Omnes enim hæreticum prodere atque accuſare debent:* and in *Treaſon* alſo thus farre, that he which doth not at leaſt reueile it, (though a man be not bound to proſecute therein as an *Accuſer*) is to be puniſhed, as partaker of the *Treaſon*. But this *Inſcription, ad pœnam Talionis*, to endure the penaltie due, if he be not able to prooue his Accuſation; *is* [6] *not required in Accuſations of priuate Crimes, whether they be Ciuilia, or Criminalia mooued and proſecuted.*

[2] Epiſt. 2. ad Epiſcopos Siciliæ.
[3] Sixtus 3. Epiſt. 2. ca. 4. ad Epiſcopos Orientales.
[4] l. 1. C. vt nemo inuitus ag.
[5] l. Manichæos. C. de hæret.
[6] l. Fin. ff. de priu. delict. l. fin. ff. de furtis.

Here perhaps ſome will marueile, how this proſecution of Crimes by way of *Accuſation*, coulde be ſo vſuall, as it was (in former times) in the common weales of *Athens*, *Rome*, and ſuch like, inſomuch as it became (there) to be the moſt *ordinarie* meane of all others, to bring Crimes and offences into queſtion: conſidering the great troubles and dangers, that by Lawe, did accompany the *Accuſers*. Such therefore are to vnderſtand, that fewe or none *Accuſers* would deale ſo vnconſideratly, as to vndertake it, vntill they thought themſelues ſufficiently furniſhed with witneſſes and other proofes, able to conuince them, whom they accuſed. Next, they are to remember, the vſe of it to haue bene greateſt in populare Common weales, where the readieſt ſteppe to attaine vnto moſt honourable offices and dignities (next vnto ſeruice in warres) was to be able to ſpeake and deliuer their mindes eloquently before the whole people; who were the ſoueraigne Iudges (in moſt of thoſe cauſes) either by way of *Accuſation*, or els in *Defence* of others, being by *Accuſation* called into dangerous queſtion

ſtion of their liues, limmes, honour, libertie, countrey, or of their goods and landes. Thirdly, that when it was in moſt frequent vſe, the people were heathen, and vninſtructed in the true knowledge of God: ſo that they thought, to put vp an iniurie done either to themſelues, or to their friendes, to be great puſillanimitie, and a token of a baſe minded man; and to be (in deede) a vice very diſcommendable, euen as the contrary vice thereunto is; viz. of doing Iniurie. For ſo [1] *Ariſtotle* teacheth in his *Morall philoſophie.* In which reſpect, all danger to themſelues, was the leſſe regarded by them. Laſtly, they thought themſelues bounde in ſtrict termes of duetie, no leſſe to perſecute and to plague their enemies by all meanes, then they were to doe good, and to ſhew kindeneſſe vnto their friendes. Therefore the ſame [2] *Philoſopher* makes this to be a good argument and conſequence; *Wee muſt doe good to our friendes; therefore we muſt hurt and annoy our enemies.* But Chriſt refuteth this heatheniſh opinion in the Goſpel, *Matth. 5. verſ. 43. & 44.*

[1] Ariſt. lib. 5. Ethic.

[2] Ariſt. 2. li. Topic.

Now for proofes of that wee haue ſaide in this behalfe, we are furniſhed of them out of the graueſt writers among the *Greekes* and *Latines.* *Plutarch* ſaith thus: [3] *Publique Iudgements and Accuſations haue bene of long time ordeined, to th'entent young men might be bredde vp in the ſtudie of Eloquence; and that they might thereby be excited to the valoure of a braue minde: that like as dogs of the beſt kinde by naturall inſtinct doe at firſt ſight fiercely aſſaile wilde beaſtes: euen ſo noble youthes ſhould be kindled and inflamed with great courage thus by accuſations to ſet vpon lewde and euill members in a Common weale.* To like purpoſe [4] writeth *Quintilian*; *Credidi ſunt clari Iuuenes, obſidem dare Reipub. malorum Ciuium accuſationem: quia nec odiſſe improbos, nec ſimultatem prouocare, niſi ex fiduciâ bonæ mentis videbantur.* *Tullie* aſſigneth three ſeuerall motiues, whereby without any diſcommendation in thoſe times a man might be drawen to become an *Accuſer* of others. *A man may be well induced* (ſaith he) [5] *to be an Accuſer, either Pietate, in a duetifull care: by neceſſitie; or els by reaſon of his yeeres. If hee willingly enter into it, I doe attribute it to his Pietie: If he were commanded, then vnto neceſſitie: If in hope to attaine glory and renowne, I aſcribe it to his youth. But vpon any other occaſion to doe it, doth rather deſerue reſiſtance, then pardon.*

[3] Plut. in vita Luculli.

[4] Quintil. li. 12. ca. 7.

[5] Cic. pro Cœlio.

He

He alſo elſe-where teacheth, for what ende we may enter into
[1] Cic. li. 2. Offic. *Accuſation* of others. *Of accuſing, we are not,* (ſaith he) [1] *to make as it were an vſuall trade or profeſſion; neither are we at any time to doe it, but either in behalfe of the Common weale, as the two Luculli did; or for our neareſt friends and allies, being tyrannouſly, and piteouſly oppreſſed, whom we haue receiued to our patronizing, as M. Cato, Cn. Domitius, and others did: or els but once onely, as happely in our flouriſhing youth, for attayning honour thereby.* But it ſeemeth, that the chiefeſt ende among the reſt was, for procuring with the people glorie & reputation of eloquence vnto thẽſelues. For
[2] Apuleius in 2. defenſ. Mag. ſo *Apuleius* an auncient writer teſtifieth, where he [2] ſaith thus. *He doth not accuſe me for to procure vnto himſelfe glorie, as M. Antonius did Cn. Carbo &c. For it was vſuall* (ſaith he) *with yong men of greateſt ripeneſſe in learning, for their commendation to vndertake to accuſe others, thereby to giue an experiment of themſelues in Iudiciall Courts, to the entent, that at ſome notable Iudgement or arraignement they might become knowen vnto the multitude of Citizens. Yet this Cuſtome, which in olde time was permitted vnto yong beginners, to ſet out thereby the forwardneſſe and ſharpeneſſe of their wittes, is long agone* (ſaith he) *growne into diſuſe.* But what might be the very true cauſes of the giuing ouer of ſuch *Accuſations*, it will not be amiſſe here alſo to examine, as being very requiſite for the perfite vnderſtanding of the nature of it, and of ſome other diſcourſes following.

CHAP. IIII.

That the proſecution of crimes by way of Accuſation *is in moſt places forbidden or growne into diſvſe: the reaſons hereof be partly the dangers to the* Accuſers, *and partly the* Hatefulneſſe *of that courſe. Therein is alſo declared whether all* Accuſation *be vnlawfull; and certaine points deliuered to be obſerued by all them, that will accuſe others.*

IT is very aſſured, that how vſual ſoeuer it was in thoſe populare Common weales; yet of very long time it hath not, nor is now practiſed in moſt ciuil Common weales or kingdomes, that I haue read of. But in place thereof, is come either proceeding of *meere Office*, or els

els ſome way *mixt*, partly of that proceeding, and partly of proſecutiō by a *Partie*, who is not properly to be termed an *Accuſer*.

Firſt in this kingdom how rarely *Appeales* be brought and proſecuted againſt any ſuppoſed offenders, ſauing murderers, & thoſe ſcarſe two in an age, euery one but of meane experience knoweth. I doe call to mind one *Appeale* of robberie brought by *Benet Smith* againſt *Giles Rufford* in the beginning of Queene *Maries* raigne; as appeareth by the preamble of a Statute, *2 & 3. Phil. & Mariæ, c. 17.* And this kind of proſecution of Crimes, though of all thoſe which we haue, it reſemble neereſt the *Accuſation* practiſed amongſt the olde *Romanes* and others: yet in ſome points it doeth alſo ſomewhat differ from it.

In *Flanders* all *Accuſation* is altogether inhibited. In the kingdome of *Naples* it is onely permitted [1] vnto thoſe, which in that ſort will proſecute ſome iniurie or enormitie, done vpon them or theirs. In the [2] *Venetian* common weale, it is wholie forbidden vnto priuate perſons to *Accuſe*: ſo that the care of proſecuting offences, is wholie left to the publike magiſtrate. *In France none but the kings generall Atturneis* (whereof there be three) *may take vpon him* [3] *to be an Accuſer*: and yet thoſe not properly ſo to bee called. And this reaſon is alleaged by a learned writer in Law, of that nation; *Leaſt too great opportunitie of calumniation and of oppreſſing the meaneſt by the power of the mightie, ſhould thereby be giuen; and for retaining of publike tranquillitie in the kingdome.* It is teſtified by a graue & learned *Ciuilian* writer, [4] that the ſolemne maner of *Accuſation* mentioned in the *Ciuill* law of the *Romanes*, is almoſt generally now growen in diſuſe.

[1] Clarus, q. 10.
[2] Decianus.
[3] Gul. Bened. in c. Rainutius. V. mortuo. nu. 200. de teſtam.
[4] Clarus li. 5. §. fin. q. 11.

The chiefeſt cauſes of ſuch diſuſe thereof (as I doe conieƈture) hath growen by theſe two wayes. The firſt, becauſe it is ſo full of danger and trouble: The ſecond, becauſe it is and hath bene ſo odious and abhorred of moſt men in all ages. The danger and trouble may be conſidered at the beginning of the ſuite: in the courſe of proſecuting it; and vpon the euent which may enſue of it.

At the entrance of the ſuite, vpon the *Accuſers* inſcription (*[5] which contained the hainouſneſſe of the crime, and the time of committing it*) the *Accuſer* was by and by to [6] endure *Cuſtodiæ ſimilitudi-*

[5] l. 16. C. de accuſ. & inſcrip.
[6] l. 17. ibidem.

militudinem, habitâ tamen dignitatis æstimatione; to bee committed to the like safe custodie that the defendant was; regard alwayes beyng had to his dignitie. [1] *He was also then bound with good Caution of sueries to prosecute the suite.* Much like to the first of these was that lawe which was established by *Crem* [2] the lawe-giuer vnto the *Bulgarians*; who prouided that *none accuser should haue audience giuen, vntill being bound and brought to the torture, it were by his owne examination found out, vpon what probable grounds his accusation rested.*

[1] l. Qui crimen, C. Qui accus. non possunt.

[2] Suidas in verbo Bulgar.

In the course of prosecution much trouble may grow vnto *Accusers, especially* [3] *in the crimes of Treason or Heresie. For in both these, not onely the defendant, but the Accuser also is subiect to examination by torture,* vbi non subsunt indicia, *where no plaine or probable matter appeareth, whether of them saieth truer.*

[3] Carrer. de Hæres. cons. 117.

The *Inscription also* (aforesayd) *bindeth the Accuser to endure some punishment, vpon detection of any rashe or vndue practise in the Accusation.* This rashnesse [4] or lewd practise consisteth in three seuerall points, and euery of them subiect to their punishments. The first is, when the *Accuser* doeth *prævaricari*, that is, *collude with the defendant in dealing against him: Dicis causa, & pro forma tantùm, for fashion sake*; perhaps to keepe others from it, as by suppressing or concealing the best proofes, and by admitting of false and slender defences brought and alleaged in the defendants excuse. The second is, when he doeth *Tergiuersari*, that is, *giue ouer and desist from his prosecution, vpon corruption, &c.* The last is, when hee doeth *Calumniari*, that is, *wilfully* [5] *impute false crimes vnto the defendant, which hee cannot proone*; or make any vniust petition, or by any other meanes deale deceitfully & maliciously. This may bee resembled to that which wee call at the Common lawe *Conspiracie*; sauing that onely damages in money be giuen thereupon. And this perill doeth fall out chieflie, and is discouered vpon the euent of the suite, when it is brought to an ende. For if the *Accuser* be pronounced guiltie of such *Calumniation*; then must hee endure the same punishment, which the accused partie ought to haue suffered, if hee had bene found guiltie; called by *Aristotle* ἀντιπεπονθὸς, and by others *pœna talionis.*

[4] l. 1, ad S.C. Turpillianum.

[5] Gloss. in Clem. 1. de sentent. & re iudicat.

This appeareth by the *Ciuill* lawe, and is allowed also by the *Ecclesiasticall.* By the *Ciuill*, as namely by the Constitution of the Empe-

Emperors *Honorius* and *Theodoſius*, where it is ſaid to *an Accuſer*; [1] *Nec impunitam fore nouerit licentiam mentiendi, cum calumniantes, ad vindictam poſcat ſimilitudo ſupplicij. Let him not thinke hee hath free libertie giuen falſlie to accuſe others, & that without puniſhment; ſeeing the courſe of Iuſtice requireth that for due reuenge Calumniators doe ſuffer the like puniſhment, which they vniuſtly would haue brought vpon others.*

[1] l. 17. C. de accuſ. & inſcrip.

It is alſo allowed by the lawe *Eccleſiaſticall.* [2] For, *Calumniator ſi in accuſatione defecerit, talionem recipiat. If an Accuſer bee found to calumniate, let him receiue the puniſhment due to the crime imputed.* [3] *Qui non probauerit quod obiecit; pœnam quam ipſe intulerit, patiatur. He that prooueth not his accuſation, let him ſuffer the ſame puniſhment, into the danger of which hee brought another man.* And to the [4] verie ſame effect did *Sixtus* an ancient biſhop of *Rome* write to the biſhops of the Eaſt partes. Yea, beſides the like penaltie, it was decreed in a Councill, [5] that *the Accuſer that fayled in proofe, ſhould bee excommunicate. If the Accuſer can not* (ſaieth the Canon of the Councill) *proone by witneſſes that which hee obiecteth; then let him endure that excommunication, which the partie accuſed ſhould haue done, if hee had bene conuicted.* Neither can this be thought too grieuous for him, that willinglie and maliciouſlie without iuſt cauſe, will conſpire againſt an other: let him impute his puniſhment to his own follie. *Actor debet venire paratus.* Beſides the like puniſhment; ſuch an *Accuſer* by the old [6] *Canons*, was alſo pronounced an infamous perſon.

[2] Damaſus ep. 3. ad Steph. Archiepiſc.

[3] Hadrianus 2. q 3. c. qui non.

[4] Sixtus c. 4. in 1. volum. concil.

[5] Concil. Bracar. 2. Can. 8. An. Dom. 610.

[6] Gelaſius ibid. c. ſi quis.

But from the grieuouſneſſe of this *pœna talionis*, or for *Calumniation* preſumed, *all publike Officers (who* [7] *by vertue of their office are bound to Accuſe) bee cleerelie freed and exempted.* Such are called *Aduocati, & Promotores fiſcales, & regy, The kings Attorneis or Solliciters generall.* The reaſon hereof was, becauſe they did not of their owne voluntarie will, or for reuenge, as ordinarie *Accuſers* vndertake ſuch proſecution; but for the benefite which redoundeth to the whole common wealth by the puniſhment of Offenders. Beſides, *they were not to reape any commoditie or gratification thereby* [8] *vnto themſelues by part of the penaltie or fine; whereby they might bee corrupted or drawen to doe more thē otherwiſe were expedient.* And therefore in both theſe reſpects ſuch are freed from all ſuſpicion of wilfull *Calumniation*, or re-

[7] l. poſt legatum. §. Aduocatum. ff. de his quibus vt indignis. l. qui cum maior. §. penult. ff. de bonis libert.

[8] Bart. & alij in l. Si quis in graui. §. vtrum. ff. ad S. C. Syllanianum.

uengefull bringing of men vnto a dangerous queſtion and triall. Thus much how perilous this *Accuſation* is.

How hatefull it is vnto others, and deteſted of moſt men, for one willinglie (as with delite) to become a *publike Accuſer*; may appeare firſt by the reſtraint thereof. [1] *Ariſtotle* ſaieth, *That in a well ordered common weale, Accuſations ought to be moſt rare.* That very lawe (by authoritie whereof it was moſt vſed) prouideth, *That it ſhall not be lawfull at any time* [2] *for a man to accuſe more then two.* And an *Accuſers voyce* is called *an abhominable or deadlie voyce*, eſpeciallie his that will *Accuſe* the maſter of that familie where hee is commorant. *Let ſuch an Accuſers breath* (ſaieth that lawe) [3] *in the very beginning, before it be heard, be ſtopped with a ſword. Vocem enim funeſtam amputari oportet, potiùs, quàm audiri.*

1 Arist. 6. l. Polit. cap. 5.

2 l. Hos accuſa. §. 1. Iulia. ff. de accuſ. l. cum rationib. C. qui accuſ. non poſſunt.

3 l. 10. C. Qui accuſ. non poſſunt.

Furthermore, it is naturallie giuen to vs all, to pitie euen ſtrangers when they bee brought into danger and diſtreſſe by others; and in ſort to abhorre them that doe wilfullie procure it. *They ought* (ſaieth *Tullie* in this behalfe) [4] *to weie with themſelues that an Accuſation is no meane matter, but of great importance. It is much for a man to addreſſe himſelfe vnto that, whereby hee may caſt another out of his countrey, or take him out of this life; who both ſtandes defended by himſelfe and by his friends, yea and by ſuch, as be meere ſtrangers vnto him. For wee all willinglie runne to helpe to keepe off dangers: and when a man is called into triall for his life, libertie or Countrey (if he bee not a very enemie vnto vs) wee doe tender and yeeld vnto him the good offices, wiſhes, and endeuours of moſt perfect friends; albeit in deed he bee a meere ſtranger vnto vs.*

4 Cic. pro Murena.

How hardlie *Tullie* himſelfe (though ſometimes he vſed it) thought hereof in the time of his age, this ſaying of his declareth. [5] *It is the part of an hard hearted and cruell man, yea rather of no man, to bring manie into danger* Capitis, *of their liues, liberties or countrey. For beſides that it is full of perill, euen to the Accuſer himſelfe; it is alſo very infamous for a man to bring vpon himſelfe to be termed an Accuſer. Neither can it poſſibly be done without great wickedneſſe, that a man for filthie lucres ſake ſhould turne eloquence (which was deuiſed for the helpe and preſeruation of men) vnto their plague and vtter ouerthrow.*

5 Cic. li. 2. Offic.

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This courſe was ſo hatefull, that oftentimes ſuch as purſued it, were vpbraided with it as odious. For *Mamercus Scaurus* [1] when he accuſed *Seianus*, hauing this caſt in his teeth, *ſought to excuſe himſelfe by the examples of their forefathers, that had done the like.* But *Cornelius Tacitus* (who reporteth this ſtorie) iudgeth it to be *an infamous endeuor, whereby noble families are greatly ſtained and diſhoneſted. Seneca* reporteth [2] that vnder *Tiberius* the Emperour, this *rage of publike accuſing* (for ſo he termeth it) *was very rife:* and ſayth, that *it did waſte that Common weale (euen in that time of peace) more then any ciuill and inteſtine warre, which they had amongſt themſelues, had done in times by paſt.*

[1] Tacitus l. 3. Annalium.

[2] Senec. li. 3. de benefic.

And not onely theſe Heathen men, but the *Fathers of* the Church, had it alſo in like deteſtation, that a man by *Accuſations* ſhould be ſo carefull to bring other men into danger; which [3] *S. Auguſtine* therefore among others greatly reprehendeth. And he ſaith in another place thus: [4] *All matters, wherein we ſuffer any indignitie, are of two ſorts: The one is ſuch as cannot be reſtored; the other which may be. Now for that which cannot be reſtored, we ſeeke ſome comfort by taking reuenge. But (alas) what doth it auaile thee, if thou being ſmitten doeſt ſmite againe, or that another doe it, to reuenge thy quarrell? Will that hurt which is in thy body, be thereby healed? Which ſeeing it cannot be truely ſaid, it muſt needes be, that all theſe reuengements proceed but from an haughtie and a proud heart.* In this regard, [5] olde *Canons* do call *Accuſation, Genus illaudabilis intentionis, a kinde of diſcommendable endeuour or ſute.* The reaſon whereof is, for that it is done (for the moſt part) vpon a reuengefull and wrathfull minde, whatſoeuer be pretended otherwiſe. *If a man to excuſe this, ſhall thinke that herein he pleaſeth God,* [6] *for that he accuſeth offenders; ſaying, that he doth it for their reformation and amendment*; this man (as is teſtified) *labour eth but vainely, and is in deed carried with a ſting of malice, rather then heat of charitie.* So that beſides the danger to himſelfe, we ſee how odious a kinde of proſecution, *Accuſation* hath bene holden: and therefore we are not to maruell, that it is either recalled by contrary lawes (as in moſt places) or growen in a maner to an vniuerſall diſuſe in the world.

[3] Auguſt. li. 1. confeſſ. cap. 18.

[4] Auguſt. in Sermone Domini in monte.

[5] c. Si quis epiſc. 2. q. 7.

[6] Anaclet. ep. 1. de oppreſ. epiſcoporum.

Hereupon, and perhaps alſo vpon occaſion of certaine places of *Scripture*, ſome may gather that the courſe of *Accuſation*

is altogether vnlawfull to be vſed by any Chriſtian. In deed, thus it is written in *Leuiticus*: [1] *Thou ſhalt not ſtand againſt the blond of thy neighbour; I am the Lord.* And a little after: [2] *Thou ſhalt not auenge, nor be mindefull of wrong againſt the children of thy people, but ſhalt loue thy neighbour as thy ſelfe; I am the Lorde.* Likewiſe *Ieſus* the ſonne of *Syrach* ſayth: [3] *Be not angry for any wrong with thy neighbour, and doe nothing by iniurious practiſes.* In the Goſpell wee are thus commanded: [4] *Ye haue heard, that it hath bene ſayd; an eye for an eye, and a tooth for a tooth. But I ſay vnto you, reſiſt not euill; but whoſoeuer ſhall ſmite thee on thy right cheeke, turne to him the other alſo.* Againe, [5] *Loue your enemies; bleſſe them that curſe you; doe good to them that hate you, and pray for them which hurt you, and perſecute you.* Which commandements are alſo repeated by [6] *S. Luke.* And to like purpoſe [7] ſayth *S. Paul: There is vtterly a fault among you, becauſe ye goe to law one with another. Why rather ſuffer ye not wrong? why rather ſuſteine ye not loſſe?*

1 Leu. cap. 19. ℣. 16.
2 Verſ. 18. ibid.
3 Eccleſiaſticus cap. 10. ℣. 6.
4 Matth. 5. ℣. 38 & 39
5 Verſ. 44. ibid.
6 Luke cap. 6. ℣. 27. &c.
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Truely it may not be denied, but that the pregnancie of theſe places is ſuch, that all proſecution of priuate iniuries or crimes, done vpon reuenge, malice, enuie, vaine-glorie, gaine, or any ſuch like particular reſpect alone, is heereby condemned. For in *Accuſation* it is firſt required, that a reuengefull minde be wanting, which is preſumed to be preſent, when the iniurie proſecuted is but priuate, and ſuch as is not ſubiect to reſtitution, according to the former diſtinction repeated out of *S. Auguſtine.* Secondly, it muſt be done vpon a good zeale; to the entent the offender may be amended, and others not hurt, by the euill example. *For by thoſe* [8] *wordes of the Goſpell, ſuch puniſhment of ſinne, as tendeth to correction, is not forbidden; becauſe that is a part of mercie,* ſayth *S. Auguſtine.* And (ſayth hee) [9] *holy men haue puniſhed certeine ſinnes euen with death, both to ſtrike a profitable feare into the liuing, and that the death it ſelfe might not hurt them, who were puniſhed by it, but the ſinne diminiſhed, which was like rather to be encreaſed in them, if they ſhoulde haue liued longer.* Thirdly, *Accuſation* by a *Chriſtian* ought to be referred onely to the publike benefit of the Common weale. In this behalfe *Plato* (being but an heathen Philoſopher) hath a very ſeuere ſaying. [10] *It is an holy thing* (ſayth hee) *to draw them into iudgement, that haue*

8 Auguſt. in ſer. Domini in mõte.
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10 Plato in Euthyph.

haue committed any murther or ſacrilege, whether it be thy father, mother, or any other whoſoeuer, that hath ſo offended: ſo it be done for this end, to ridde the Common weale of them, as of a contagious plague vnto it. Laſtly, *Accuſation* may not be vſed for gaine and lucres ſake. For ſuch *Accuſers* eſpecially are odious to all men. Another heathen writer could ſay thus heereof: [1] *The vſe of this gainefull and blouddie eloquence, is ſprung vp of late times by corrupt cuſtome; and was deuiſed* (as one *Aper* was woont to ſay) *but inſtead of a iauelin or dart to thruſt men thorow with: In locum teli repertus.*

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So that if men could keepe themſelues ſtrictly within theſe former boundes; then proſecution by *Accuſation* would neither be ſo perilous to the *Accuſer*, nor yet ſo hurtfull vnto others, but that it might ſtill haue a tollerable and profitable vſe in *Chriſtian* Common weales. And then, that which *Tullie* writeth, might haue place, where hee ſayth; that [2] *it is profitable to haue many Accuſers in a Common weale; yet ſo, as that men be not abuſed by ſuch Accuſations.* And thus much for *proſecution of crimes by a partie.*

[2] Pro S. Roſcio Amer.

CHAP. V.

Of the ſeuerall acceptions of this word Officium: *the ſignification of* Inquiſitio; Quæſtio; Crimina ordinaria & extraordinaria; Cognitio ordinaria *or* perpetua, & extraordinaria: *the reaſon why* Enquirie by Office *came in place of* Accuſation: *of* Enquirie *generall and ſpeciall:* Enquirie *ſpeciall* ex officio nobili ſiue mero, mixto, & promoto: *and the priuileges of proceeding* ex mero officio, *aboue the other.*

NOw becauſe the aforeſaid *Cautions* be ſo hard to obſerue, and for that *Accuſation* is ſo odious and of ſo perillous conſequence (albeit theſe foure points were kept) in caſe either the Magiſtrate or people (among whome wee liue) ſhould not ſo conſtrue our doings, as perhaps we doe ſincerely meane them; therefore where there be ſo many difficulties incident to *Accuſation*, leſt crimes and offences ſhould remaine wholly vndiſcouered, and ſo vnpuniſhed, to the great detriment of the whole body of the Common weale and Church:

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NOw becauſe the aforeſaid *Cautions* be ſo hard to obſerue, and for that *Accuſation* is ſo odious and of ſo perillous conſequence (albeit theſe foure points were kept) in caſe either the Magiſtrate or people (among whome wee liue) ſhould not ſo conſtrue our doings, as perhaps we doe ſincerely meane them; therefore where there be ſo many difficulties incident to *Accuſation*, leſt crimes and offences ſhould remaine wholly vndiſcouered, and ſo vnpuniſhed, to the great detriment of the whole body of the Common weale and Church:

Church: It was very neceſſarily prouided in moſt places of the world, to haue the *Iudges office by Enquirie* to ſupply this want and ſcarſitie of *Accuſers* and *parties*, which is the other generall meane afore ſpoken of, whereby offences may be brought into queſtion & examination. The *Office* or duetie of the *Iudge*, is the cauſe efficient of this proſecution: and *Enquirie* is the peculiar effect and act, which in *Criminall* matters that cauſe produceth; or the courſe whereby the *Office* doth proceed; and is that kinde of proſecution, which is counterdiuided againſt *Accuſation*, and *proſecution* by a partie.

The word *Officium* in the *Ciuill* law (from whence it is taken) hath diuers acceptions. It ſignifieth either *priuate dueties* and thinges of conueniencie to be regarded and practiced, in the common life and ſocietie of man with man; or els ſome more *publike function*. And in this latter ſignification, we reade of it to be taken two wayes. By the firſt, for a miniſteriall function vnto ſome Court, hauing iuriſdiction. And by the ſecond, for the *power, authoritie*, or *iuriſdiction* it ſelfe of the Court. I doe obſerue three ſeuerall miniſteriall functions termed in the *Ciuill* lawes by this name *Officium*. The firſt are thoſe perſons, that were publikely appointed to preſent crimes vnto the Magiſtrates: as in theſe words: [1] *Quæ per officium præſidibus nunciantur.* The ſecond denoteth vnto vs an *Apparatour*, as in theſe words: [2] *Officio, quod tuis meritis obſecundat, non Curialem quenquam, nec ex cæteris corporibus volumus aggregari &c.* The third an *Actuarie* that entred the acts of the Court; as in theſe lawes: [3] *Officio tuæ magnitudinis, datis precibus poſtulant &c.* And againe, [4] *Officium Helleſponti adijt, & rogaut &c.* In both which lawes by the word *Officium*, an *Actuarie* is vnderſtood.

But *Officium* ſignifying the *authoritie* and *iuriſdiction* of the Iudge, is that *power*, whereby he may deale of himſelfe, without the petition or inſtance of a partie. And this *Office* is exerciſed either in actions *Ciuill*, or in *Criminall*. In actions *Ciuill*[5] ſometimes the Iudge doth of *Office* decree a thing which he findeth to be equall beſides the action, and beſides the bond (whereupon the action riſeth:) and[6] ſometimes alſo (vpon a point in equitie) hee relieueth by his *Office* ſuch, as the ſtrict law giueth none action vnto. *Caliſtratus* reduceth all cauſes *Ciuill*, wherein a Iudge

[1] L. ea quidem C. de accuſ. & inſcrip.
[2] L. 1. C. de Apparit. Procoſſ. lib. 12.
[3] L. 11. C. de Numerarijs, Actuarijs. li. 12.
[4] L. 1. C. de offic. Comitis ſacri patrimonij.
[5] L. 56. ff. locati, l. 51. §. fin. ff. de act. empti.
[6] L. Si longiùs, §. 1 ff. de iudic. l. cum filiuſſam. ff. de reb. creditis. l. 7. C. de iudic. & alibi paſſim.

a Iudge hath conuſance *extraordinarie*, vnto theſe two generall heads: *Per cognitionem* [1] *(viz. extraordinariam, ſiue officio Iudicis factam) aut de honoribus ſiue muneribus gerendis agitatur; aut de re pecuniaria diſceptatur.* A Iudge exerciſeth his authoritie *extraordinarie* in cauſes *Ciuill*, either when hee taketh knowledge of bearing offices and functions; or of cauſes pecuniarie.

[1] L.5.ff.de extraord.cognit.

But in cauſes *Criminall* hee practiſeth this authoritie *of Office*; *aut cum* [2] *de exiſtimatione alicuius cognoſcitur*; *aut cùm de capitali crimine quæritur*: when hee ſitteth to take knowledge, whether a mans honour or reputation ought to be atteinted; or when he *enquires* and makes *inquiſition* of ſome crime capitall; viz. whereby a mans libertie, countrey, or life may bee endamaged. This *Office Ouid* touched [3] in theſe wordes:

[2] Calliſtratus ibid.

[3] Ouid.lib.1. de Triſtib.

Iudicis Officium eſt, vt res, ita tempora rerum
Quærere.——

The effect of the Iudges *Office*, and the courſe which hee thereupon doth followe, is called *Enquirie*. *Inquirere* (ſaith *Bartolus*) *eſt* [4] *quaſi intus quærere, diligentiùs abdita indagare, ſecreta detegere, & in iudicium deducere.* It is to ſearch into a matter deepely and carefully, that is kept cloſe, to bring it to triall of iudgement, which it deſerueth.

[4] Bartol. in l. tranſigere. nu. 13. C. de tranſaction.

This *Enquirie* in the old common wealth of *Rome*, was more commonly called [5] *Quæſtio*. Which word hath two ſignifications in that lawe. The one more generall, ſignifying any *enquirie*: The other, *that enquirie* and examination, which was vſed vpon bond ſlaues, and men of the meaner ſort, by torture. *Quæſtionem ſic accipimus*, (ſayeth the *Ciuill* lawe to this purpoſe) *non tormenta tantùm, ſed omnem inquiſitionem & defenſionem* (or as another reading hath it) *detectionem mortis.* Where we ſee, that the worde *Inquiſitio* is alſo vſed. Of this worde *Quæſtio*, ſuch as dealt by it, were called *Quæſtores*: and ſo doth [6] *Virgil* call *Minos* a Iudge, *quæſtorem*. Out of which (by abbreuiation) came the worde *quæſtor*, and *quæſtura*.

[5] l.1.§ item illud.ff.de S.C. Syllan.

[6] Virgil.6. Æneid.

It is here to be remembred, that in the common wealth of *Rome*, before the people had conueied ouer, and graunted away all their power and authoritie vnto the *Emperour*; they had in

themſelues ſoueraigne authoritie aſwell of puniſhing heinous crimes, as al other matters of importance. Crimes which be more heinous, were called *publica crimina*, crimes againſt the ſtate: and the other, *priuata delicta*, priuate offences, being of leſſe importance, and done but to priuate perſons dammage. The puniſhment for ſome of the *publike crimes*, the people reſerued to themſelues onely: but ſome other of them were firſt put ouer vnto certaine *Officers* purpoſely thereunto appointed, called *Quæſtores ſiue Quæſitores Parricidij*; becauſe they dealt in them (for the moſt part) of *Office* by way of *Enquirie*. Yet their dealing therein was called *Ordinaria cognitio & ordinaria Quæſtio*: And the crimes which they enquired of, *Ordinaria crimina*, vpon the ſame occaſion.

In the ſixe hundred and fifth yeere from the firſt foundation of that Citie, it was ordeyned, that out of [1] the ſixe *Prætours* for the time being, foure ſhoulde continually after bee choſen to bee *Quæſitores* of ſo many crimes allotted vnto their ſeuerall hearing and determining: and therevpon thoſe *Enquiries* were called not onely *Ordinariæ*, but alſo *Quæſtiones perpetuæ*; perpetuall and *Ordinarie Enquiries* of ſuch crimes, as were ſo committed ouer by the people. Vnto which number *Sylla* in his *Dictatorſhippe* added three other kindes of crimes: and ſo there became (in all) ſeuen *perpetuæ & ordinariæ quæſtiones*; and ſo many *Quæſitores* of thoſe ſeuen crimes onely. For the coniſance of all other publike crimes, did remaine ſtill in the people, as afore.

[1] Tullie in Bruto & pro Cluentio.

But when ſo euer it happened either afore or after the appointing of ſuch *perpetuall and ordinarie Enquiries*, that the people (as it ſeemed good vnto them for the time) did commit ouer vnto ſeuerall *Magiſtrates*, [2] whether *Dictatours*, *Conſuls*, or *Prætours*, the coniſance of any particular publique offence; becauſe this was not *ordinarilie* ſo done, but vpon that ſpeciall occaſion, and for that one *Enquirie*, and they no ſet officers for that purpoſe: therefore it was ſaide to be committed *extra ordinem*, and was therevpon called *Quæſtio vel cognitio extraordinaria*.

[2] Vide totum titulum ff. de extraord. crimin. & titulos plurimos ſequentes.

After this maner *extra ordinem* was a commiſſion [3] of *Enquirie* graunted to *Fabius Maximus* the *Dictatour*, againſt ſuch of

[3] Liui. lib. 19.

of the men of *Capua*, as were chiefe auctors of the conſpiracie, and defection from the *Romanes*. The like to this here in *England* we vſually call a ſpeciall Commiſſion of *Oier*, and *terminer*, for ſome one matter. All other *priuate* and leſſe crimes, the coniſance whereof was not reſerued to the people, [1] were *Enquired* of and puniſhed *Ordinarilie* by him that was *Præfectus vrbi:* And therefore they were alſo called *Ordinaria crimina*, and the coniſance which he vſed therein, *Cognitio ſiue Quæſtio ordinaria*. And this appellation and diſtinction of *Ordinarie* and *Extraordinarie* Crimes and Coniſance of them, remayned after the popular Common weale was ſurpriſed by Emperours; being by this occaſion firſt begunne. So that *Extraordinarie* is not that (as ſome doe ignorantly imagine) which is contrary to good order; but any thing ſwaruing from the vſuall and more ordinarie courſe, and may bee both allowable and expedient; notwithſtanding it be ſo called. And in this acception thoſe wordes in theſe two rules are to be vnderſtoode and taken: viz. *Vbi ſubeſt remedium Ordinarium, ibi ceſſat Extraordinarium:* And, *Vbi ceſſat Ordinarium, ibi Extraordinarium remedium eſt aduocandum.*

[1] l.1.ff.de Offic. Præfect.vrbi.

If it ſhall here be asked, why both the courſe of *Accuſation* (which in olde times was more vſuall) is now leſſe frequented; and alſo why *Enquirie*, that was counted *Extraordinarie*, [2] is now become an *Ordinarie remedie*, and [3] ſucceedes into the place of *Accuſation:* for further ſatisfaction in this behalfe let ſuch conſider that which followeth.

[2] c. Super his. de accuſat.
[3] Bart. in l. infamem. ff. de public. iud. Bald. in l. 4. §. 1. ff. de condict. ob turpem cauſam.

Firſt, let that be remembred, which hath bene ſpoken in the next Chapter afore, touching the *Perill* and *Hatefulneſſe* of *Accuſations*. Next, [4] that things tending to an ende, ought to be directed in ſuch ſort, as that ende may beſt be atteined. And the ende whereunto any Lawe is referred, ought eſpecially to be conſidered in all both interpretation and practiſe of Lawes. Whereas then in the times of thoſe frequent *Accuſations*, ſundry vniuſt vexations, conſpiracies, and calumniations, with other miſdemeanours in that behalfe, were very rife and vſuall: Therefore thoſe in auctoritie were forced (to auoyde innocent men from ſuch dangers) beſides the former penalties, to make Lawes frō time to time, wholly to repel and keepe backe ſundry

[4] Tho. 2. 2. q. 33. art. 6.

ſorts of perſons from *Accuſing*: whereby this kinde of proſecution grew dayly to more and more diſuſe. So that it was requiſite for reſtraint of *Offenders*, to expect at the Iudges handes for his *Office* ſake, this neceſſarie duetie of proſecuting Crimes; a courſe more voyde from ſuſpicion of ſuch calumniation: whereby that ende which the Law ſhot at, viz. to haue *Offenders* found out and puniſhed, was farre better, and with fewer inconueniences effected.

It was further conſidered by men of wiſdome, how the greatneſſe of the mutuall perill on both ſides, did dayly driue both the *Accuſer* and the *Accuſed*, vnto vntollerable extremities. For when the *Accuſer* had once vndertaken the matter to his owne apparant danger, if he coulde not proue it: was it not as likely (as it was eaſie) that he would rather ſecretly ſuborne vntrue witneſſes; then that by his enemies ſafetie, himſelfe ſhould be puniſhed? A matter of fearefull inconuenience, conſidering that [1] *it is better, an Offender in deede ſhoulde eſcape, then that any man which is innocent, ſhould be puniſhed.*

[1] l. Abſentem. ff. de pœnis.

On the contrary ſide, if the defendant finding himſelfe in deede guiltie, ſhould propoſe his chalenges or exceptions in law againſt the *Accuſer* (which for his defence with Iuſtice might not be denied vnto him) can it be doubted, but that he might eaſily alſo ſuborne witneſſes, for proofe of all his challenges; and ſo by auoyding the Plaintife from *Accuſing*, auoyd alſo the peril he was in, how pregnant matter ſoeuer did otherwiſe lie againſt him? Whereby it might often happen, that ſome vpright *Accuſers*, who euer for pure zeale of Iuſtice did proſecute, ſhould be endamaged both in their ſubſtance and good name; ſundry *Offenders* ſhould eſcape deſerued puniſhment; and ſo the whole ſcope of ſeuere Lawes prouided againſt Crimes, ſhould be fruſtrated and quite ouerthrowen. And therefore in great wiſdome was this rigorous point of Iuſtice and hatefull courſe, thought good to be mitigated; and therefore by inſenſible degrees of cuſtome, turned to a more moderate and ſaſe courſe, not onely for the *Proſecuter*, but alſo for the *defendant*. For *mitiùs agitur* [2] *cum inquiſito conuicto, quàm cum accuſato.* He that is cõuicted by way of *Accuſation* (eſpecially by the Canon law) is more grieuouſly puniſhed, then he which is conuicted vpon *Enquirie*. Which yet

[2] Abbas in ca. inquiſi de accuſat.

is

is alwayes ſo tied, that being a proſecution *of Office*; the Iudge needs not lend his aſſiſtance, but where he ſeeth good and probable inducement to ground it vpon.

All *Enquirie* is either *Generall* or *Speciall*. [1] *Generall Enquirie* is a preparatorie courſe proceeding of *meere Office*, purpoſed to enquire and finde out criminous perſons, within ſome certaine territorie or compaſſe. This is of three ſortes. The firſt is *generall*, in reſpect of the perſons; but *ſpeciall* in reſpect of the fault: as when the *Coroner* inquireth of a murder committed, and no certaine perſon knowen: or an *Ordinarie* of a forgerie in ſome cauſe Eccleſiaſticall. And by this [2] *Enquirie generall*, in certaine hainous crimes, euerie priuate perſon may *enquire*, to bring the Offenders in by lawe to be iuſtified. The ſecond is *generall* in reſpect of the faultes, but *ſpeciall* in regard of the perſons: as when ſome *Hoſpitall*, *College*, or *Cathedrall Church* is viſited. The third and laſt is *generall*, both in reſpect of the perſons and faults, as a generall viſitation of a whole *Diœceſſe*; or an *Enquirie* made by the *grand Iurie* at an *Aſſiſe* or *Seſſions* of the Peace for the whole Countie.

[1] Bald. in l. ea quidem. C. de accuſat.

[2] l. 1. C. de falſa moneta. l. 1. C. de rapt. Virgin.

[3] *Speciall Enquirie* is, when ſome certaine and ſingular perſon and crime alſo, is enquired of, and brought by due courſe of iudgement vnto triall, to the intent to be puniſhed. This *Enquirie* is done either when there is a kinde of proſecuter beſides the Iudge, albeit the proceeding bee of *Office*: or when there is abſolutelie no proſecuter beſides the Iudge himſelfe, againſt the partie conuented. There may beſides the Iudge be proſecuters of the *Office* in two ſeuerall degrees. One that doeth proſecute throughout the whole ſuite: as when an Information for the *Queene* alone, or for the *Queene* and Informer, is put vp at the Common lawe, and is termed by the lawe Eccleſiaſticall, *Officium promotum*. The other, which doeth but proſecute or ſollicite in ſome part of the ſuite; as by furniſhing the Court with proofes, &c. which is called *Officium mixtum*, in ſome temporall courtes, a *Relater*.

[3] Summa Antonini. part. 3. t. 9. c. 7.

Likewiſe [4] *Officium promotum* is of two ſortes. The firſt is, when a man voluntarilie offereth himſelfe to proſecute, called *Promotor voluntarius officij*; and he differeth a litle from a *Partie*. The ſecond is, when the Court aſſigneth one to ſollicite the *Of-*

[4] Abbas in c. cum dilectis, de Purg. canonica.

fice, who is termed *Neceſſarius promotor officij*, becauſe hee may not refuſe this emploiment. But when no perſecuter at all doeth ſtirre in the matter: then the Court onely doeth it in ductie to the Common wealth, and to ſee ſinne and diſorder puniſhed. Then is this *Enquirie* termed *Officium* ſimplie, or *Officium merum* by the *Canon* lawe, and by the *Ciuill* lawes *Officium Nobile*, as of more woorth and dignitie, then the other courſe which is by a *Partie*, and at his petition and inſtance. For by a more baſe appellation (in compariſon of the former) that lawe termeth this, *Officium Mercenarium, ac ſi mercede aliquâ propoſitâ alterius petitionis quaſi deſeruiret*: that is, when the *Office* of the Iudge is (as it were) hired and employed, but at another mans becke, to ſerue his turne. For albeit in temporall courtes of other realmes, long cuſtome (which is [1] the Wel-ſpring of all their iuriſdiction) hath [2] eſtabliſhed the verie ſame courſe of proceeding in cauſes criminall, euen at the inſtance of a *Partie*, with that which may bee done when the *Office* of the Court alone proceedeth: neuertheleſſe the lawe it ſelfe hath giuen greater priuiledges vnto proceeding of *Meere Office*, then vnto the other: which was ſome occaſion alſo, why it was the rather called *Nobile Officium Iudicis*. The firſt priuiledge is, that whereas by lawe nowe altered by Cuſtome, an *Accuſer* or *Partie* (properlie ſo called) is in danger of *Pœna talionis*, if he faile in his prooſes, *Propter præſumptam Calumniam*: yet the preſumption and entendment [3] of lawe runneth not ſo againſt a Iudge exerciſing but the publike lawes by his *Office*, as it doeth againſt a *Partie*. And therefore is hee not ſubiect to that penaltie as a proſecuter is. [4] *Non videtur facere iniuriam, qui iure publico vtitur*. The next priuiledge by lawe yeelded vnto, proceeding of *Office* in a *Criminall* cauſe, which is denied to a proſecuter, yea though he bee not an *Accuſer* or *Partie*, properlie ſo called; is, that the Iudge proceeding [5] of *Office* may giue an othe to the defendant, to anſwere ſome criminall matter. But it is otherwiſe, when the ſuite is at the inſtance of a partie which proſecuteth, becauſe the defendant ought not to bee driuen to furniſh vp his aduerſaries intention. Thirdly, an *Ordinarie* or delegate *Ad vniuerſitatem cauſarum*, that proceedeth of *Office*, is not bound to make prooſes of the [6] *fame* (ſauing before his ſuperi-

[1] Crauetta. Conſil. 238. nu. 7.
[2] Alph. lib. 3. c. 11.
[3] Arg. c. in noſtr. de procur. & in c. ad audientiam. de præſcrip.
[4] l. iniuriarũ. §. 2. ff. de iniurijs.
[5] Panor. in c. qualiter. el. 2. de accuſat.
[6] Pan. ibid. & alij DD.

ſuperiour Iudge, if an appellation be brought and doe lie) becauſe it ſufficeth, that the *fame* is apparant and knowen vnto himſelfe. But it is otherwiſe in a delegate of one cauſe, or vpon the inſtance of one, that *voluntarily* proſecuteth. Fourthly, when the ſute is at the *inſtance* of a *partie*, contrarie proofes for proofe of the defendants good *fame*, are admitted. But this need not be granted vpon proceeding *of Office*; becauſe [1] the law doth not entend and preſume againſt the ſinceritie of the Iudge, as againſt the *partie* proſecuting. Fiftly, vpon the inſtance of a *voluntarie* proſecutour or preferrer vnto the *Office*, [2] *ſit litis conteſtatio* (as I may Engliſh it) an iſſue is ioyned betweene the two parties. But if either one be but a ſoliciter and aſſiſtant to the *Office*; or els a preferrer aſſigned by the Iudge; or that the proceeding be of meere *Office*: there is then no conteſtation in the ſute (properly ſo to be termed) but a kinde of contradiction (in ſted thereof) required, betwixt the *fame* or *denunciation &c.* on the one ſide; and the defendants anſwere by deniall on the other ſide. Laſtly, when the proceeding is of *Office*, [4] (euen after publication) moe witneſſes may be receiued, becauſe the feare of ſubornation in this caſe ceaſeth, being the onely reaſon of that rule, *viz. that after publication moe witneſſes may not be receiued*: Inſomuch as depoſitions of witneſſes are alwayes publiſhed vnto the Iudge: But new witneſſes may not be receiued, when it is at the proſecution of a *voluntarie partie*, for feare of ſuborning them in the pointes, where he findes the former depoſitions came too ſhort of his purpoſe. So that in theſe reſpects the rather, this proceeding of *meere Office* might be termed, *Nobile Iudicis Officium*. Thus farre touching *Office* and *Enquirie* by vertue thereof.

[1] Arg. c. in noſtr. de procur. &c. ad audientiam de præſcrip.

[2] Hoſtienſ. in c. cum clamor. de teſtibus.

[4] Arg. c. cum clamor. de teſtibus.

CHAP.

CHAP. VI.

Of Denunciation, *a ſpeciall meanes of ſtirring vp the* Office : *the manifolde vſe thereof in the olde Common weale and Empire of* Rome ; *and at this preſent on the other ſide the Sea : the generall acception of that word : foure kindes of* Denunciation : *how they differ one from another : what is required in them : and when a* Denouncer *is to be condemned or excuſed of expenſes. And what courſe of dealing againſt crimes and offences is holden both in Courts of the Eccleſiaſticall commiſſion, and in ordinary Courts Eccleſiaſticall in this Realme.*

BVt becauſe it is not poſſible for a Iudge of all other men by himſelfe alone to haue knowledge of moſt crimes committed, or probably entended to be committed : therefore haue thoſe lawes deuiſed ſundrie meanes to bring and preferre them vnto his knowledge and *Office*. Among which *Denunciation* is principall, and indeed ſo generall; that (by ſundry writers) it is made a third and ſeuerall kinde of proceeding againſt crimes, and by them counterdiuided againſt *Accuſation* and *Enquirie*. In which reſpect, I thinke it not inconuenient for the preſent purpoſe, to haue the nature of it alſo ſomething opened. Neuertheleſſe it is in deed no different courſe from *Enquirie*,[1] but a ſpeciall meanes or inſtrument *eliciendi potentiam in Actum : viz.* of drawing the Iudges power and *Office* into action by *Enquirie*. *Denunciation* in a generall ſignification may be deſcribed thus; *viz. A relating of ſome mans crime vnto a Iudge, to the end to haue the* Offender *reformed or puniſhed; yet without that ſolemne inſcription by the* Denouncer, *which the law requires in an Accuſation.*

[1] Spec. tit. de denunc. nu. 16.

But I holde it requiſite firſt to note, what vſe hereof and aſſiſtance vnto the *Office* of *Enquiry*, the olde *Romanes* had in their policie by *Denunciators*; as it is recorded to memorie in the *Ciuill* lawes of that people. Which I do the rather in this place, as in the former diſcourſe I haue done, to meet with the childiſh and ſiniſter conceit of ſome; who ſuppoſe euery thing deuiſed and brought in by any *Canon*, how olde or neceſſarie ſoeuer it be; to be no better then *Popiſh* & *Antichriſtian*; and *eo ipſo* (without

out further adoe or iudgement) to bee condemned. For (I hope) they will not iudge the lawes and policie of the *Romanes* to be *Popiſh*, *Antichriſtian*, or *vnreaſonable*; being (for ciuill prudence) the wiſeſt and mightieſt people that euer was, and altogether *Heathens*, when thoſe lawes were framed and practiſed.

Of thoſe, whom we now commonly call *Denunciators*, the law *Ciuill* hath two ſorts. One ſort are thoſe, who (being priuate men) doe willingly (for gaines ſake) *denounce* others. Of theſe [1] that law thus ſpeaketh: *As no man is at firſt compelled Nunciare, to denounce any crime againſt another: ſo cannot ſuch a Delatour deſiſt, when it pleaſeth himſelfe.* So that theſe be both *Nunciatores* and *Delatores*. Of theſe *Delatours* (being a kinde of *Parties*) I haue ſpoken before.

[1] L. Res quæ. § vlt. ff. ad S.C. Turpill.

The other are ſuch, as by reaſon of ſome *Office* or publicke charge, layed vpon them, are to *Denounce* offenders vnto the Iudge, to be by him proceeded with, vnto puniſhment. Theſe (in generall) by the Emperour *Conſtantinus* haue this title giuen vnto them; [2] *Publicæ ſolicitudinis cura*, the care and regard of publike watchfulneſſe. His wordes to that purpoſe be theſe: *In quacunque cauſa reo exhibito, ſiue accuſator exiſtat, ſiue eum publicæ ſolicitudinis cura perduxerit; ſtatim debet Quæſtio fieri, vt noxius puniatur, innocens abſoluatur.* Where (we ſee) the two kindes of *Criminall* proſecution are touched, and the proceeding of *Office*, is there counterdiuided againſt *Accuſation*.

[2] L. 1. C. de cuſtodia reorum.

And theſe hauing ſuch charge, be alſo of two ſenerall ſortes. The firſt whereof, beſides their *Denunciation* and relating of crimes vnto ſuperiour Magiſtrates, had authoritie alſo to enter into ſome *Enquirie* and *Examination*. Of theſe, certeine were called *Curatores Viarum*, [3] who alſo had a kinde of iuriſdiction for meaner faultes committed in the high wayes, and had two *Lictores* or Sergeants (for that purpoſe) attending them. They enquired of *Office* vpon offenders and diſturbers of the publike peace in high wayes. Others were called *Latrunculatores*, who ſought vp, and made generall *Enquirie* for offenders, and perſons to be ſuſpected; being not altogether vnlike vnto our *Prouoſt Marſhalles*. I reade [4] alſo of ſome called *Irenarchæ*, that is, principall conſeruatours of common peace and tranquillitie.

[3] L. pen. ff. de via publica. Dion Caſſius li. 54.

[4] L. D. Adrianus. ff. de cuſtod. & exhib. reis.

Theſe alſo, *præficiebantur diſciplinæ publicæ & corrigendis moribus.* [1] There were alſo men hauing charge and *Office*, not vnlike to theſe *Conſeruatours* called *Stationarij*: whereof one ſort called *Milites Stationarij & limitibus Imperij præpoſiti*, did [2] prouide for the common peace, and alſo for the ſecuritie of wayfaring men in the high wayes, eſpecially about the borders of their prouinces; hauing authoritie to enquire and examine any perſons, who they were, of what condition and ſtate of life, from whence, and whither they trauelled. And theſe made relation to the Magiſtrates of ſuch ſuſpected perſons, as they found; and of the whole ſtate of things abroad. Another ſort [3] called alſo *Stationarij* ſimply (without addition) were onely to make *Enquirie generall*, and to *denounce* and preſent crimes; and after to furniſh the *Office* with proofes of the crimes detected by them. And theſe were of the ſecond kinde of ſuch *publike denouncers*, hauing none authoritie to make examination, but did onely generally *enquire* of faultes, and preſent them vp. Such were called alſo by this appellatiue name, *Officium*: [4] as in that law of *Gordianus* the Emperour, where it is ſayd to the purpoſe in handling, thus; *Ea, quæ per Officium Præſidibus denunciantur, & citra ſolemnia Accuſationum poſſe perpendi incognitum non eſt. Verùm ſi falſis nécne Notorijs inſimulatus ſit, perpenſo iudicio, deſpici debet.* Theſe were called alſo *Officiales*; and [5] the chiefe of them that had ouerſight of the reſt, were named *Primates Officiorum.* And of them this law [6] is to be vnderſtood, *viz. Sine quicunque alius Accuſauerit, vel ad Officium nunciauerit.*

1 L. vlt. ff. de mun. & honor.

2 L. 1 §. fin. ff. de offic. præf. vrbi.

3 L. 1. C. de curioſis & Stationar. li. 12.

4 L. 7. ea quidem. C. de Accuſat.

5 L. 1. C. de priuat. carcer.

6 L. Qui ſepulchra. C. de ſepul. viol.

Other parts of *Chriſtendome* (where the *Ciuill* lawes haue place) euen to this day doe reteine ſome the like *Offices* and officers for the ſelfe ſame purpoſe, though vnder other names. In ſome countreys men of thoſe functions [7] being in townes, are called *Decani*; and in cities, *Capita Centenariorum*; who haue this miniſteriall charge layed vpon them, to enquire of miſdemeanours done within that quarter or warde, which is committed to their charge; and to denounce or preſent them vnto the Magiſtrates. And by the writers in that law, theſe being dealers in temporall Courts, and matters, are reſembled vnto the like *Officiales Iurati*, that are there in Courts Eccleſiaſticall

7 Bartol. in l. Diuus. ff. de cuſtodia reorum. Angelus in l. Si Vacantia. C. de bonis vacantib.

call. The citie of *London* hath in euery *Ward* certeine yerely appointed to a purpoſe not farre vnlike, who are called the *Ward-mote enqueſt*. And for Courts *eccleſiaſticall* the like be here in euery pariſh yerely appointed, called *Church-wardens*, and *Sidemen*, or *Queſt-men*.

Vnder the generalitie of this word *Denunciation*, three ſeuerall things be conteined. Firſt, when *denunciation* is made to the Magiſtrate, by any hauing a particular intereſt; it is called *Querela*, a Supplication or Complaint. Such is that in *S. Luke*, [1] *Reuenge me of mine aduerſarie*, ſayth the widowe vnto the wicked Iudge.

[1] Luk. 18. V. 3.

Secondly, when it is made by ſuch, as haue no particular intereſt; it is called [2] *Delatio*. But when it is done *per Aduocatos fiſci*, (ſuch as the *Atturney* generall) or by other officers purpoſely thereunto appointed, then is it properly called *Denunciatio*, *viz.* *An Information* or *Preſentment*. And thus much touching *Denunciation in Temporall courts onely*.

[2] L. delator. ff. de iure fiſci.

Denunciation generally taken, as we gather out of both the lawes *Ciuill* and *Canon*, is of foure ſeuerall kindes. The firſt is called *Euangelicall*; the ſecond *Iudiciall*; the third *Canonicall*; and the fourth *Regular*.

Euangelicall is that, which proceedeth by thoſe degrees that our *Sauiour Chriſt* preſcribeth [3] in the *Goſpell*. There be two ends hereof. [4] The principall end is, to procure repentance & amendment in him, which offendeth. The ſecondarie end [5] where this cannot be effected; is to reſtreine others from the like, by his puniſhment ſpirituall, onely touching the ſoule; but not any temporall penaltie, either directly or indirectly. But albeit the purpoſe of this *denunciation* be the parties reformation; neuertheleſſe if the crime be ſuch, as hindereth the execution of his eccleſiaſticall function; the Iudge *of Office*, is alſo to depoſe him, from his [6] *Orders*.

[3] Matt. 18. V. 15
[4] Spec. tit. d.
[5] Panor. c. nouit, de iudic.
[6] Alph. li. 2. ca. 9. concluſ. vlt. præſt. Can. Criminalis.

Concerning *Denunciation Euangelicall*, queſtion is mooued by the *Schoolemen* (who in my poore opinion doe handle it for many points, both learnedly and iudiciouſly) whether in this *denunciation* thoſe degrees of monition firſt priuately to the partie offending, and afterward before two or three witneſſes, bee neceſſarie, and at all times to be obſerued in all crimes and

offences indifferently, before the offender may be *denounced* of them, vnto the Eccleſiaſticall Magiſtrate?

For reſolution whereof; wee are to diſtinguiſh betweene *hidden* or *ſecret*, and *publike* or *open* crimes or offences. If they be wholly *hidden* and *ſecret*; then indiſtinctly thoſe degrees [1] of *monition* there preſcribed, are firſt to be obſerued, before it may be *denounced* to the Iudge; whether the offender by promiſing amendment and ſhewe of griefe, doe giue any hope of his repentance and reformation; or doe giue none at all: ſauing where the crime is of ſuch qualitie, as that [2] it tendeth to ſome great and important dammage bodily or ghoſtly of the whole bodie of Church or Common weale, or of many particular perſons: as, if it be *Hereſie*, *Conſpiracie*, or ſuch like. For inſomuch as ſuch one *ſinneth* herein, not only *againſt* thee (as the text ſpeaketh) but againſt others alſo, albeit they knowe not thereof: therefore thou oughteſt forthwith *Euangelically* to *denounce* and preſent ſuch an offence vnto the magiſtrate; to the entent the publike danger may be ſpeedily preuented: conſidering that [3] the benefite of many is to be preferred before any particular perſons *fame*: and the detriment (whether ſpirituall or corporall) of the whole Church or Common wealth, is rather to be regarded and auoided, then an euill *fame* againſt one offender, which (heereby) may perhappes be raiſed and bruited abroad.

1 Ricar. in 4. Sent. diſt. 19.

2 Thom. 2. 2. q. 33. art 2. & Ricar. vbi ſupra.

3 Gabr. Biel.

Concerning crimes or offences, we are to vnderſtand, that they may be ſayd to be [4] *publike* or *open* two maner of wayes: either when they are committed *openly*; or when being ſecret, yet they be publiſhed abroad, and the offender is *famed* & bruited, to haue committed them. Now if by either of theſe wayes, an offence be made open and *publike*; then it is to be *denounced* vnto him that hath authoritie to correct it; yea though neither of the ſayd *monitions* haue bene precedent. For [5] we are to prouide, not onely that he which hath offended, may be made better and brought to repentance: but alſo that others to whoſe knowledge it is come, be not thereby ſcandalized & offended; according to that rule of *S. Paul*: [6] *Rebuke a ſinner openly before all men, that the reſt may haue feare*: [7] And (as a ſchooleman ſayth) *that they which haue taken offence by the fault, may be edified by*

4 Petrus de Palude, in 4. Sent. 19. q. 4.

5 Thom. 2. 2. q. 33. art. 2.

6 1. Tim. 5.

7 Ricar. vbi ſupra.

by the puniſhment. But he goeth in this point further; That if it be but in the way to be publiſhed & made knowen abroad, though not as yet bruited; neuertheleſſe it is to bee *denounced* to ỹ *Iudge*, that the ſcandale which might ariſe thereof, may be (aforehand) preuented. So that if the chiefe end of this *Denunciation* cannot: yet the ſecondarie end may hereby be attained.

Neither let any man in regard of this Denunciation feare to be accounted malicious (ſaieth[1] S. *Auguſtine:*) *for you are rather blame woorthie, if by holding your peace, ye ſhall ſuffer your brother to periſh; whom you might haue ſaued by denouncing of his fault vnto them in authoritie.* And againe, [2] *Sine plectendo, ſine ignoſcendo, hoc benè agitur, vt vita hominum corrigatur.* It is very good to bring mẽ to reforme their liues, whether it be done by puniſhing them, or by forbearing them.

[1] Auguſt. ad Macedonium.

[2] Auguſt. ibid.

All *Denunciations Euangelicall* [3] (ſo they be duelie brought afore him) the eccleſiaſticall Iudge is to admit, becauſe they be referred onely to the parties reformation, or reſtraint of him and of others by *ſpirituall correction.* But his proceeding in them, is (for the moſt part) ſummarilie and not *Iudiciallie:* and as a ſpirituall *Father*, rather then a *Iudge.*

[3] Io. And. & alij DD. in c. Nouit, de iudicijs.

The next kinde, termed *Denunciation Iudiciall*, in reſpect of the *Denouncers* and matters *denounced*, is either *publike* or *priuate.* [4] *Publike*, is that *relation* or ſolemne *preſentment* of ſome crime, which is made vnto a competent Iudge, whether *Ciuill* or *Eccleſiaſticall*, by publike *Officers* thereunto appointed: whereupon the Iudge of his pure and *meere Office* proceedeth by due *Iudiciall courſe* of ſpecial *enquirie*, to the acquital & clearing of the partie *denounced*, if he be found *innocent*; or to the puniſhing of him by ſome penaltie bodilie and temporall, which is the peculiar end of this *Iudiciall denunciation*, vnto which alſo no *Monition* is required to proceed.

[4] l. Diuus ff. de Cuſt. & exh. reis, l. ea quidẽ. C. de accuſationib. l. 1. §. ſanè ff. de off. Præf. vrbi, c. epiſcopus in Synodo. 35. q. 6.

But *Iudiciall* and *priuate denunciation* is that, which may bee preferred by a priuate perſon in reſpect of a particular *intereſt* that hee hath, as being either hurt, or particularlie grieued by ſome fault or offence committed by another. The ende hereof is, not onely the puniſhment of the offender; but that the *denouncer* grieued, may be reſtored or preſerued harmeleſſe.

For explanation of the latter of theſe by examples: firſt in a

Ciuil or temporal court; [4] as when he that is oppreſſed, is a bond-man, or is ſubiect to another mans power (as an apprentice is:) ſo that hee hath none ordinarie action againſt his ſuperiour that doeth wrong him, but by this *Iudiciall denunciation*; is forced to flie vnto the *Iudges office* for remedie. In a court *eccleſiaſticall*; [2] as when a religious perſon, who hath no direct action againſt his *Prelate, denounceth* ſome grieuances done vnto him, by his *Abbot* or other ſuperiour: or when as the poore of an *Hoſpitall* doe *denounce* and relate vnto their viſitour ſome offences or grieuances done to them by the *maſter* thereof, requiring puniſhment and remedie therein by his *office*, in due courſe of lawe. And theſe two *Iudiciall* kindes of *Denunciation* are moſt frequent in this Realme, both in *Ordinarie* courtes, and alſo in courtes of *Commiſſion*, for cauſes and miſdemeanors eccleſiaſticall. But the firſt of them more vſuall in *Ordinarie* courts: & the ſecond in courts of *Commiſſion*.

§. pen. Inſt. de his qui ſunt ſui [4] vel alieni. l. 1. §. Quid autem. ff. de off. præf. vrb.

[2] Innoc. in c. Inſinuante. Qui cler. vel vov.

The third kind of *Denunciation* is *Canonicall*, (ſo called, becauſe it had his originall from that lawe;) and it hath alſo vnder it two kindes. The one more *ſpeciall*, to bee preferred and made by him onely, who hath intereſt of hauing either his *Prelate* or *Paſtour* good, or els ſome eccleſiaſticall perſon good, who is vnder his iuriſdiction. And [3] the end of this *Denunciation* is, to haue ſuch (being criminous) to be remooued from their adminiſtration eccleſiaſticall. The other *Canonicall denunciation* is more *generall*, in that it may be preferred by any whomſoeuer; and concerneth either the hinderance [4] or diſſoluing of ſome mariage contracted or to be contracted, within the degrees forbidden: or els the deſiſting from ſome ſinne, which is of that qualitie, that it increaſeth by multiplicatiõ of Acts in the ſame kind, or by continuance of ſome one Act, and wherein the *Denouncer* hath none other particular intereſt, then as euery *Chriſtian* hath beſides.

[3] c. 1. de offi. Cuſtod. c. licet Heli, de ſimon.

[4] c. præterea. de Sponſalib. c. cum inhibitio, de cland. deſponſ.

The laſt kind called *Regular*, is that *Denunciation* [5] which is publiſhed by any perſon in *Chapter*, touching ſome offence of his brother, committed contrarie to the locall and poſitiue rules or ſtatutes of that place; to the intent he may amend it hereupon, rather then that it ſhould come to a more *publike denunciation*; and from this, there lieth none *Appellation*.

[5] Specul. tit. de Denunt. §. 2. verſ. vt autem.

The two firſt kinds of *Denunciation*, viz. *Euangelicall* and *Iudiciall*,

diciall, doe differ the one from the other, in ſundry points, but eſpeciallie in theſe following. Firſt, [1] euery one (though he be infamous for ſome crime formerlie committed, ſo he perſeuere not in that crime ſtill) is admitted to *denounce* another *Euangelically*: becauſe it is indefinitelie commaunded by *Chriſt*, as a neceſſarie office of *Chriſtian* duetie, for reclaiming of our brother from offending. But none are to bee admitted to the publike *Iudiciall denunciation*; beſides thoſe which be ſpecially thereunto appointed: ſauing that the *Canons* [2] do compell all Clerkes to *denounce* the crimes of other perſons eccleſiaſticall: and to the *priuate iudiciall*, none but ſuch as haue ſome peculiar intereſt. And in this caſe it forceth not, though ſuch do euen then perſeuere in a crime; becauſe vnder pretence of crime, no mã is to be repelled from proſecution of his right.

[1] Pan. in c. nauli. de Iudiciis, addit. Vlt.

[2] c. Cauſam. Qui filii ſint legitimi. c. Quapropter. 2. q. 7. c. Quiſquis. 1. q. 1. c. primo, 5. q. 3.

Secondly, *Euangelicall denunciation* is referred to the amendment of the offender; whereas vpon the *publike Iudiciall*, his puniſhment is propounded for an end thereof: and the *priuate* is referred both to ſuch puniſhment, and that the thing be reſtored, and the *denouncer* alſo preſerued harmeleſſe.

Thirdly, vpon *Euangelicall denunciation* there is no proceeding in *foro contentioſo*, or iudiciallie, but onely in *Pœnitentiali*: whereas vpon *Iudiciall denunciation*, there enſueth a due courſe of *Iudiciall* proceeding; and thereof it hath his name.

Fourthlie and laſtly, in *priuate iudiciall denunciation* or witneſſes (other then ſuch as be lawfull and without iuſt exception) are admitted; becauſe it lieth for reſtitution of ſome thing: But in *Euangelicall*, for proofe of the firſt *priuate* monitiõ the *denouncer* alone muſt (of neceſſitie) be admitted for the witneſſe, if the *denounced* doe denie the fault: and for proofe of the ſecond monition, any one other (together with the [3] *denouncer*) may bee admitted for two witneſſes, though both of them happen to bee infamous for ſome crime in times paſt by them committed; ſo that at ſuch time of *denouncing*, they perſeuere not in the crime.

[3] μαρτυρῶν δύο ἢ τριῶν σταθήσεται πᾶν ῥῆμα. Mat. 18. v. 16.

But albeit the lawe be thus, for admitting of ſome and reiecting of others from *denouncing*: yet throughout all *Italie*, and in other places of *Chriſtendom* beſides; [4] *Cuſtome* in both courts hath thus farre preuailed, as to ſuffer any mã almoſt to *denounce*, whether

[4] Alphonſ. Villa. li. 2. de denunc. Cano. concl. 8.

ther hee doe it of his owne voluntarie minde, or by occasion of a Charge and duetie in that behalfe laied vpon him. The reason hereof is; for that the Common wealth hath interest to haue offences punished: which could not so readilie bee done, if by this way of *denouncing* they were not at all brought vnto the Magistrates notice. A matter otherwise likely to happen by reason of so many difficulties that accompanie *Accusation*, and so many exceptions, which may (by lawe) be taken both agaynst *Accusers* and *Denouncers*.

[1] Salyeetus in l. ea quidem. C. de accus. Clarus li. 5. §. fin. q. 7.

Those who haue [1] a publike charge of *Denouncing* and *Presenting*, whether they serue in Temporall or in Ecclesiasticall courtes, ought (vpon paines otherwise to be inflicted vpon them) to *present* such offences as come to their knowledge; yea though otherwise they be not opened or published commonly abroad.

[2] Clarus vbi supra. vers. Sed quæro.

Likewise in courtes *Temporall* [2] this kind of publike *denuncia-tours* ought to present some matters, which the lawes (perhaps) doe not punish at all: as namelie, if any kill an Outlawe or *Bannito*, in places where such lawe is still in force. Also such *Officers* must present all casuall violent deaths: because albeit perhaps nothing doe presently appeare, but that such death did casuallie happen: yet in processe of time, it may fall out to be discouered, that it was by some malefactour.

Lastly, when such as haue charge to enquire generally, and to present, either doe not know certainlie whether an offence be committed or not, (a thing which may happen in such crimes whereof no traces or footesteps after the fact done can remaine; as in *Adulterie*, *diffamation*, and such like:) or where a fact doeth appeare, but the *Author* thereof is not knowen (as may bee in murder, sacrilege, forgerie, &c.) in both these cases, if the commō voyce and *fame* doe runne agaimst any person in particular, they are bound to present euen such *fame* of the offender, as wel as the crimes themselues; together with all the circumstances they can learne thereof, & who be more perfectly instructed touching it, that perhaps can giue particular and more full euidence.

He that is a *denouncer* by vertue of his *Office*, is alwayes in his *presentments* to obserue, that he bee not found to haue preferred matter agaynst anie, by *manifest calumniation* or wilfull conspiracie. For [3] if this appeare euidentlie to the Iudge, euen such a

[3] Alph vbi supra.

publike

publique denounceour is not only to pay charges vnto him, whom he hath malicioufly vexed; but is otherwiſe alſo vpō the Iudges *Office* to be puniſhed, for a *Calumniatour*. But for *Calumniation* [1] onely *preſumed* (which is then entended and preſumed, when the defendant is cleared, onely becauſe nothing can be prooued againſt him:) then he that is a *Denounceour* by reaſon of his charge layd vpon him, ſhall not be preiudiced. Neuertheleſſe he that is a *voluntarie Denounceour* or preferrer, [2] if he doe but faile in his proofes, ſhall be thereupon condemned in expenſes, and be otherwiſe alſo puniſhed; albeit not ſo deepely as an *Accuſer*, yet extraordinarily by the Iudges *Office*; becauſe at his inſtigation and ſolliciting, the *Office* doeth almoſt no leſſe, then an *Accuſer* doth. The reaſon hereof is, becauſe in that he proueth not his Complaint; the Lawe preſumeth euen hereupon, that he did but moue it by *Calumniation*, for vniuſt vexation. Which thing doth often keepe euen many good men backe from all *Denunciation* of crimes, whereunto they are not ſpecially bound; as S. *Auguſtine* [3] teſtifieth in theſe words: *Good men (for the moſt part) doe beare with other mens faults, and holde their peace; becauſe they want ſufficient euidence in lawe, to approue that to the Iudges, which themſelues knowe.*

[1] l. 2. C. qui accuſare non poſſunt.

[2] Gloſſ. final. in c. dilecti. de dolo & contumacia. vide Angel. de malef. & Marian. c. Qualiter. el. 2. de accuſat.

[3] Auguſt. Hom. 50. de pœnitentia.

Yet there be certaine caſes, whereby euen a *priuate Denounceour* and *Informer* ſhalbe excuſed frō any *Calumniation* preſumed only: viz. when he makes not proofe of that which he obiecteth. The firſt is, when he did preferre it by a kinde of Neceſſitie: [4] as when the heire proſecuteth the death of him, to whō he is heire. Secondly, when it proceeded [5] vpon an extreme griefe; as when the husband accuſeth his wife of adulterie, and yet perhaps faileth in proofe. Thirdly, when the Crime [6] is very enormious; as for *Coyning*, *Treaſon*, *&c.* Fourthly, [7] when a great euil *fame* did runne thereupon. Fiftly, [8] when the *Denounceour* prooueth, that he heard the infamie ſpoken of, by men worthy to be credited. Sixtly, [9] when his witneſſes pretending to him they could proue the Crime, doe deceiue him. Laſtly, [10] when he maketh halfe a good proofe, as by one witnes without exception; which the *Ciuilians* terme *Semiplenam probationem*. For in all theſe Caſes, the *præſumed* and *entended Calumniation* (grounded vpon this point onely, for that the *Denounceour* failed in proofe) doeth iuſtly ceaſe.

[4] l. cum fratrem. C. de his quib. vt indignis.

[5] l. Quamuis. C. de adult.

[6] l. 1. C. de falsâ Monetâ.

[7] l. Miles. §. mulier. ff. de adulter.

[8] c. de Sent. excom.

[9] Gl. in c. Panlum. 2. q. 3.

[10] Io. And. in c. cum dilect. de Elect.

ceaſe. But otherwiſe, the aforeſaide generall rule of condemnation in expenſes, &c. is to be obſerued. Thus much then of *Denunciation*, the moſt vſuall and generall inducement of a Iudges deſcending to *Enquirie ſpeciall* againſt a particular perſon, for ſome ſuppoſed Crime.

Nowe it followeth to ſhewe (ſo neere as I can) what courſe of dealing againſt Crimes and offences is holden both in the Court of Eccleſiaſticall commiſſion (which of the two is more egerly impugned) and alſo in *ordinarie* Courts *Eccleſiaſticall*, at leaſt ſo farre as by Lawe is warrantable, if an appellation be brought.

The matters handled in the *Commiſſion Eccleſiaſticall*, are ſuch *Crimes Eccleſiaſticall* as are ſpoken of in the firſt treatiſe: being aggrauated (aboue the ordinarie courſe of them) by ſome circumſtance of moment. Alſo theſe beſides, attaching, and conuenting of *Ieſuites*, *Seminarie Prieſtes* and *recuſants of both ſorts*, *execution and puniſhment of the breache of certaine Statutes*, as touching her *Maieſties* lawfull *ſuperioritie Eccleſiaſticall*, yeelded vnto her Highneſſe by [1]Parliament: the Statute *for vniformitie of Common prayer*, and the Statute *to reforme certaine diſorders in the Miniſters of the Church*: puniſhing of *Libellers*, *ſlaunderous reports*, and *diſordered preaching* againſt *Perſons* and *matters Eccleſiaſticall* by lawe eſtabliſhed: *miſdemeanours about Marriages: conuenticles*, tending to *ſchiſme*: *Abuſe* and *contempt to Miniſters*: *exceſſiue vſuries*, *ſimonies*, *inceſts*, *adulteries* and other foule *incontinencies*, *ſubornations of periuries in matters Eccleſiaſticall*, and ſuch like: when (either by reaſon of the power of the delinquents, or through ſome materiall circumſtance) they be not ſo readily and eaſily reformable, by *ordinarie* iuriſdiction.

[1] 1.& 5. Eliz. 8. Eliz. cap. 2. 23. El. cap. 12.

Theſe matters are brought thither, when *Ordinaries* be noted of negligence in giuing redreſſe: or when they deſire aide, either for the greatneſſe of the *partie*, whom poore men dare not preſent or denounce, or for the *delinquents* often remoouing from one *Diœceſſe* to another, or for the dwelling of the witneſſes elſe where, or for the offenders frequent, friuolous, and chargeable appeales, or for ſuch like conſiderable occaſion: or vpon credible information made by ſome great perſonage, or of ſome that be

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in that Commiſſion,or being referred from her *Maieſtie*,or from the *Lords of the Counſell:* or vpon complaint of ſome *partie* iuſtly grieued,otherwiſe being without remedie: or by complaint of a whole Pariſh,or of a great part thereof:or vpon frequent relation of ſundry credible perſons taking offence and griefe thereat(and ſetting downe particular euidence of the facte) or in *aide* and *aſſiſtance* of *ordinarie* Iuriſdiction: as when the *delinquent* hath no certaine place of abode: or laſtly by ſome *notorietie of the fact*,as by the parties knowen hand-writing: or for a matter done in great aſſembly of people,and ſuch like.

Hereupon Articles be framed, wherein are conteined the place,time,and oftentimes the perſons able to teſtifie & informe further,and all ſuch other circumſtances and *Indicia*,(which I interprete as the worde is commonly vſed *Euidences*,) tending to the plainer manifeſtation of the Crime. The Articles are peruſed and allowed to be incident to the coniſance of that Court, and conteining ſufficient detection to open a way to proceede (by way of further *enquirie ex officio*,into that crime) by one of thoſe three *Commiſſioners* at the leaſt,(whereof one is of the *Quorum*) that doe ſubſcribe the Proceſſe, for conuenting of the *partie*.

This Proceſſe is either by way of *Citation* (commonly there called *letters miſſiue*) or by way of *attachment*, when the *partie* is fugitiue,or flitting,or the Crimes be *grieuous* and publikely *offenſiue*, ſo that it may probably be feared,he will lurke or ſteppe out of the way for a time. But in both courſes,ſome one is bound to the Queenes Maieſtie to proſecute, & to furniſh the Court with witneſſes for proofe of the matter,not to compound it priuately, and to pay charges vnto the *partie*, if it ſhal appeare he hath bene (without iuſt cauſe) troubled. Yet where the *Commiſſioners* themſelues are ſufficiently enformed *Indicijs*, viz. with *euident matter* againſt the *partie*, and where no ſuch *proſecutor* or *relator* doeth offer to follow it, (ſo that the Court it ſelfe takes chiefe care of the proſecution) in ſome like fewe caſes, ſuch bonde is omitted.

Nowe when as the *partie* appeareth (for ſuch iuſt conſiderations as hereafter are debated and prooued lawfull) he is required on her *Maieſties* behalfe, to take *oathe* to anſwere the *Articles* or *Interrogatories* truely,(being matters of his owne

facte and knowledge, ſo farre foorth as by lawe he is bound) before euery particular thereof be made knowen vnto him; leaſt after peruſall (afore his oath taken) he be drawen by counſell to anſwere cauteloufly, indirectly, or wholly to refuſe to make anſwere: perhaps, becauſe he ſees they touch him ouer neerely, as coniecturing by whom they may be prooued. But after the *oath* is taken (in ſetting downe his anſwere) he may conſider as aduiſedly, and deliberate for ſo long time, as in any reaſon may be deſired.

And thus farre foorth the partie conuented, is (for the moſt part without any partie at all) proceeded with, but *ex officio Iudicum nobils vel mero:* to the intent, he may not bee priuileged to ſay, that he is not bounde to anſwere; being at the ſuite of the *Office*, and duetie of the *Iudge* (for the publique intereſt of the Church and Common-weale) as perhaps by Lawe he might, if it were at firſt preferred and proſecuted by *a partie*. But after he hath perfitely anſwered them (for the moſt part) *a partie* is then made; who (if ſufficient matter be not confeſſed thereupon to proceede vnto a iudgement, vpon the Articles and anſwere) doeth take vpon him to prooue it by witneſſes; and then *Interrogatories*, *exceptions againſt witneſſes*, and other *defenſes*, (for the conuented partie) are vſed almoſt wholly, as in *Ordinarie* Courtes. By which making of *a partie*, that which was *merum officium* afore, doeth afterward become *officium mixtum*, viz. *ex mero & promoto.*

When the matter comes to finall iudgement, if the partie bee conuicted, hee is puniſhed either by *penance*, (for his reformation, and for ſatisfaction of the Church offended) or by *impriſonment*, *fine*, or *cenſures* of the Church, or by ſo many of them, as is thought fitteſt, or by him or others moſt feared, or to be moſt conuenient, weighing alwayes the qualitie of the perſon, and the offence, together with other circumſtances thereof.

In *ordinarie Iuriſdiction*, Crimes be vſually proceeded againſt either *ex officio promoto*, that is, at the *inſtance* and petition of ſome, that will voluntarily ſtirre vp and ſollicite the *Iudge vnto his duetie:* or elſe *ex officio Iudicis mero.* In the firſt of theſe, albeit the partie conuented is bound to anſwere matters

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by oathe (if it bee required) ſo they bee not of the Crime obiected: yet the rule is, that he is not bounde to anſwere (vpon oathe) touching the very Crime it ſelfe, notwithſtanding a *fame* doe runne hereupon, vntill he ſhalbe enioyned his purgation.

But when an *Ordinarie* proceedeth againſt a crime, without a partie promouent, viz. *ex officio mero:* then his proceeding muſt be grounded either vpon a preſentment of a fame, or of the crime (made by ſuch as be ſpecially deputed thereunto, as Churchwardens, &c.) or proued by other witneſſes, or elſe vpon *notorietie of the facte*, ſpeeches and information (of credible perſons touching ſuch fame or ſcandale thereupon riſen) brought often vnto his eares (which is called *clamoſa inſinuatio*) or by ſome other courſe allowed by lawe to be ſufficient, to open a way vnto ſuch proceeding.

If it be vpon a perfite *preſentment* of the *crime* or *fame* thereof, the Iudge may ſafely without doubt of nullitie or grieuance in that behalfe proceede *ex officio:* and ſo may vrge the partie preſented to anſwere vpon his oath, touching the very crime it ſelfe. But if there be no ſuch *preſentment*, but *clamoſa inſinuatio delata ad aures ſuas*, or ſome equiualent matter, whereby the partie becomes offenſiue and ſcandalous (though no man will proſecute or preſent him) yet the Iudge may and ought *ex officio* of very duetie, to proceede vnto the examination of neighbours there abouts, touching ſuch *fame* or *crime:* which *fame* if it ſhall be by ſuch enquirie found and prooued, then he may proceede as afore. But if vpon ſuch *denunciation* and *notification* had from credible perſons, and the crime being not declared to be *notorius*, nor none *infamie* or *ſcandall* prooued or preſented, nor any other ſufficient meane to open way to ſuch *Enquirie*, he ſhal neuertheleſſe proceede, and vrge the partie to anſwere of the very crime vpon his oath: this (of it ſelfe) ſhall make none errour or nullitie in the proceeding, albeit not warranted by lawe. For if the partie conuented ſhall make none oppoſition (as by ſaying that he is not *preſented*, nor yet defamed of it &c. but be contented to anſwere) then the proceſſe ſhall ſtand ſound by reaſon of his ſubmiſſion vnto the proceedings. But if the partie (taking cauſe of grieuance) ſhall appeale from ſuch proceeding, then the *Ordi-*

narie muſt be able before the Iudge of the appeale (out of the Actes) to iuſtifie either the *fame*, by ſome *preſentment* thereof made, or by witneſſes, or the *notorietie of the fact*, or elſe *ſcandall* found by way of *enquirie*, or by ſome *denunciation*, ſufficient *Indicia* and *euidences* (found afore) as the law doth allowe, to open a way vnto him, to proceede by enquirie *ex officio*. For (otherwiſe) the Iudge *A quo* (being made *partie* in the ſecond inſtance) ſhall be adiudged by his ſuperiour Iudge to haue done him a grieuance, to haue his proceedings therein reuerſed, and to pay charges to the partie *appellant*.

Theſe be the courſes of proceeding (in this behalfe) of both the ſaid *eccleſiaſticall* Courtes within this Realme: which in the Treatiſe following (for thoſe aforeſaid principall points chalenged) remaine nowe to be particularly iuſtified: and ſhall hereafter (if neede require) be ſhewed to hold for lawe and equitie a more ſtrict and exact courſe in many points, then not onely Courtes *Eccleſiaſticall*, but euen *Ciuill*, (or as we heere ſpeake) *Temporall* Courtes (on the other ſide the Sea,) vſually doe obſerue: or then (by the *Canon*, or *Ciuill* lawes in ſome reſpects) were needefull, if it were ſo thought expedient.

CHAP. VII.

The Ciuill *and* Canon *lawes allowe ſundry meanes to grounde a* ſpeciall Enquirie of Office *againſt a crime, beſides Accuſation and* Preſentment: *an anſwere to a ſuppoſed* Rule: *how from* Generall, *they deſcend to* ſpeciall Enquirie: *That beſides theſe two, either a* fame, *or* clamoſa inſinuatio; *or* priuate Iudiciall Denunciation; *or* Canonical Denunciation; *or* Indicia; *or taking with the maner, or other* Notorietie *of the fact; or* Appeachment *by ſome of the* Cõplices; *or* colluſion of the Accuſer; *or the not obiecting in due time, that euery of theſe do wãt: or when the* Enquirie *tendeth but to a ſpiritual puniſhment; may ſeuerally any of them ſerue, to warrant ſuch* Enquirie: *with ſome obſeruations touching the nature of moſt of theſe.*

THe *publike Iudiciall denunciation* which is made and preferred vp by ſpeciall Officers aſſigned for that purpoſe, in vſuall ſpeache we terme *preſentment:* and is that *preſentment*, which muſt needes be meant by the autors of the firſt opinion that is to be handled

handled in this ſecond part, which is this, viz. *that an eccleſiaſticall Court may not proceede againſt any crime, without an Accuſation or preſentment.* And it falleth in now very aptly to be treated of in this place.

But if it ſhould be ſaid, that vnder the worde *preſentment*, any *denunciation* whatſoeuer were vnderſtood by the authors of that opinion: beſides that it is neuer ſo generally taken, the practice of *eccleſiaſticall iuriſdiction* alſo, would not then (hereby) be reſtrained (which that opinion eſpecially ſhooteth at) but rather much more enlarged, then they would be willing vnto. And yet though it were ſo generally to be vnderſtood; neuertheleſſe this opinion could not be truely defended, as ſhall here be made manifeſt God willing.

It is ſhewed before, that *Accuſation* and *Preſentment* be courſes of proceeding moſt properly and peculiarly incident to Courtes, guided either by the *Ciuill*, or by *eccleſiaſticall* lawes. So that we finde the authors of this opinion herein to deale ſomewhat more liberally, then certaine doe in other points: in that theſe doe hereby allow vnto an *eccleſiaſticall* Court, ſome courſe of proceeding, according to the lawe *eccleſiaſticall*.

I mind firſt to impugne this opinion, by ſhewing out of thoſe two lawes, that a Iudge may haue Coniſance againſt crimes, not onely vpon the proſecution of ſome partie, which is none *Accuſer*; but alſo *of Office* by way of *ſpeciall enquirie*; though no ſuch *ſolemne preſentment* be preferred vp, by *Officers* purpoſely thereunto appointed: and therefore, that ſundry proceedings are warranted againſt crimes, without *Accuſation*, or *preſentment*.

It hath bin ſhewed afore, that[1] vnto euery *Accuſatiõ* an *Inſcriptiõ* of the *Accuſer* to endure *pœnam talionis*, in caſe he proue not his intention, is neceſſarily required. But the proceeding to the coniſance of a crime by way of *Exceptiõ repulſiue* only, or both *Repulſiue* & *Recriminatiue* againſt the *Accuſer*; is done by a *partie*, that is not to vſe ſuch *Inſcription:* And therfore ſome proceeding may be againſt crimes by a *partie*, that is none *Accuſer*. The like is truely to be ſaid of both the ſortes of *Iudiciall Querele* or complaints, mentioned alſo in the *ſixth Chapter* of this ſecond part.

[1] l. libellorum. ff de accuſ. l. 5. C. de his qui accuſare non poſſunt.

Furthermore, at the *Ciuill* lawe, both *Delatours* of concealements or intruſions, and *Delatours* alſo vpon pecuniarie penall lawes,

lawes, doe omit ſuch *Inſcription:* and therefore are none *Accuſers.* For if we will affirme the proceeding vpon their proſecution, to be at the inſtance of a *partie*; then doth it follow hereupon, that ſome may be a *partie* in preferring offences & faultes, which is none *Accuſer.* But if we will call it proceeding of *Office*, yet is it ſtill without any *preſentment* by *officers* ſpecially thereunto appointed. And therefore it followeth, that the lawe *Ciuill* admitteth ſome proſecution of offences, without either *Accuſation* or *Preſentment.* The ſame may be affirmed of *Proſecutours* or parties at the law *eccleſiaſticall*, proſecuting either *ex officio promoto vel mixto.* For there is neither *Inſcription* to make them *Accuſers*, nor *preſentment* by *officers* thereunto aſſigned.

Perhaps here (by *præoccupation*) that *Rule* wilbe obiected by ſome, whereby is ſaid, that *No man is to be condemned without an Accuſour.* Which doth encounter both that which is to be ſpoken by me againſt this opinion; and alſo for, and in behalfe, of all this proceeding of *Office:* and alſo doth ouerthrowe the opinion it ſelfe, that we haue nowe in handling. For *preſentment*, which is one of the courſes allowed by this opinion, hath none vſe in an *Accuſation*, but onely openeth a way to the Iudges *Office* for *ſpeciall enquirie* againſt him that is preſented. So that if by ſuch *Rule* no proſecution might be againſt crimes, otherwiſe then by *Accuſation*: then all *preſentments*, which be preparatories to proceeding of *Office*, muſt wholy ceaſe.

For clearing of which doubt, I anſwere: that if this were a *Rule* (as is pretended) yet (like as all other *Rules*) it hath many limitations, or excepted Caſes. But [1] a great learned *Ciuilian* of late times teacheth vs, that no ſuch *Rule* can be gathered out of any lawe, and therefore was (through miſtaking) framed but by the common ſort of Interpretours onely. The wordes of law, whence it is pretended to be gathered, be theſe: [2] *If a man haue none Accuſer, let him not bee debarred from Offices of credite and honour.* Nowe it is not hereby forbidden to condemne an offendour vpon any courſe of proceeding beſides *Accuſation*; but only that a man ſhal not for a ſuppoſed offence, in the meane time be kept from bearing offices, vntill he ſhalbe iudicially called into queſtion for it. This will more plainely appeare ſo to be, if we ſhall call to our remembrance, how many ſundry ſortes of *Denouncia-*

[1] Duaren. diſput. anniuer. li. 1. c. 38.

[2] l. Reſcrip. § ſi quis. ff. de munerib. & honor.

tours

atours (afore ſpoken of) were receiued and vſed by the *Ciuill* law in the olde *Romane* Common weale and Empire, who were not tied to any *Inſcription*. And beſides theſe *denunciatours*,[1] the magiſtrates themſelues alſo, are by that law required (euen without any *denunciatours*) to ſearch out robbers and other diſturbers of the Common peace, and to puniſh them ſeuerely. And in truth it muſt needs turne to the great preiudice of the Common weale, if no Magiſtrates at all ſhould deale againſt any offenders, vntill ſome *Accuſers*, yea or *denouncers* might be found.

[1] L. 1. §. Quoties ff. de offic. præf. vrbi. l. 4. ff. ad L. Iuli. peculi. l. 3. ff. de offi. præf. §. vlt. D. Collat. in Nouel. l. 1. C. de cuſtod. reorum. l. ſi quis in hoc. C. de epiſ.

Furthermore, the Emperour *Traiane* writing to *Plinius*, would not haue the *Chriſtians*[2] (whom as it ſeemeth, he ſomewhat fauored) purpoſely ſought vp & enquired for by the Magiſtrates appointment; but to be puniſhed onely, when they were voluntarily preferred vp vnto thē by others. Which doth argue plainly, that the cuſtome was then, to haue other ſorts of offenders ſought for, and found out by the Iudges and Magiſtrates; yea though none other man preferred matter againſt them. Yea, the words of the law in this behalfe are clere. [3] *Mandatis cauetur de ſacrilegijs; vt præſides ſacrilegos, latrones, plagiarios conquirant; & (pront quiſq; deliquerit) in eum animaduertant. Et ſic conſtitutionibus cauetur, vt ſacrilegi extra ordinem, dignâ pœnâ puniantur.* Neuertheleſſe, to the entent that Iudges may put away from themſelues all ſuſpicion of *calumniation* and *conſpiracie* againſt men; the ſaid learned man aduiſeth them, not to deſcend to *Enquirie of office* againſt any eſpeciall perſon, but vpon ſome *publike fame, or other good occaſion of inducement to leade them thereunto.* But as for *generall Enquirie*, the Iudge in duetie is bound ſo often to make it, as the preſcript of lawes doth beare; that thereby ſuppoſed offenders being found out and diſcouered, may be brought into queſtion, and vnto ſpeciall triall.

[2] Lib. 10. epiſt. Plinij.

[3] L. 4. §. 1. ff. ad L. Iul. Peculatus.

Now therefore I will ſhew, that there is allowed proſecution of ſpeciall crimes of *Office*; yet without any ſuch *Preſentment* precedent, as by this opinion is implied. It is true by the *Rule* of law, that *generall Enquiry* is precedent as a preparatorie courſe to make way vnto the Iudges *Office* of proceeding by *ſpeciall Enquirie* againſt ſuch, as thereby ſhall be detected, denounced, & preſented. In which reſpect it is ſaid, that [4] *as Inſcription goeth before Accuſation; ſo doth Preſentment before Enquirie.*

[4] c. qualiter el. 2. de accuſat.

Now, vpon detection made vnto them, either vpon *generall enquirie*, or otherwiſe (as it is teſtified by learned [1] writers in the *Ciuill* law) ſuch Iudges as be diſcreet and ſage, doe cuſtomably (in moſt prouinces) ſecretly receiue the witneſſes depoſitions in writing (for the information of the Court) before the ſuppoſed offender be cited either *really* by attachment, or *verbally* by proceſſe ſerued on him. This they doe thus afore-hand, in two reſpects: both that the defendant be not forewarned to flie or to hide himſelfe; and that the witneſſes (by ſubornation or other ſiniſter practiſe of the defendant) be not drawen away afterward to denie the trueth, and to depoſe the contrary.

[1] Salycetus in l. fin. C. de Quæſt. Iul. Clarus lib. 5. §. fin. q 11.

If the defendant ſhall afterward make his apparance, and denie the matter obiected againſt him; then be the witneſſes reexamined and ſworne againe in his preſence. But if he ſhall ſtill wilfully abſent himſelfe; in that caſe the firſt examination of the witneſſes may ſerue for the Iudge to proceed by, euen vnto *definitiue ſentence* againſt him.

This firſt receiuing of *information* from witneſſes, is called in that law *Proceſſus informatiuus*; and the reſt of the whole proceeding of the Iudge after the defendants apparance, or his wilfull abſence, is *proceſſus punitiuus*. And vnto the taking of the *proceſſe informatiue* (though ſome haue diſputed otherwiſe) it is commonly holden, [2] not to be neceſſarie; that the ſuppoſed delinquent ſhould be called. Which courſe of taking informations doth very much reſemble the examination and enquiry againſt ſuſpected malefactors, which commonly is vſed by Iuſtices of the peace and other Magiſtrates here in *England*.

[2] Ferretus. Conſil. 31. num. 11.

But albeit detection riſing vpon *generall enquirie*, doe (in this ſort) often and very vſually make way to *ſpeciall*: yet neuertheleſſe both thoſe lawes do mention many and ſundry other receiued meanes beſides, whereupon to ground a Iudges *ſpeciall enquirie*: So that albeit *Preſentment* be one; yet is it not the onely meanes, to open a way vnto proceeding of *Office by enquirie*.

The firſt of ſuch meanes is a *Fame* of an offence to be by ſome certeine perſon committed. For albeit no *Fame* be preſented by *officers* ſpecially appointed: yet if there be ſuch a *fame* in deed to be prooued, when need ſhall require; [3] then an *Ordinarie* Iudge may hereupon proceed to *ſpeciall enquirie* againſt the offender

[3] Panor. in c. Inquiſitionis, de accuſat.

offender ſo by *fame* diſcoured.

This word *Fame* is deriued from the *Greeke* word φημὶ, and both of them ἀπὸ τοῦ φάσθαι or φάμι, *quaſi à fando*, of ſpeaking; as a thing often ſpoken and by many. And therefore is it by *Tullie* [1] defined to be *teſtimonium multitudinis*; the teſtimony of a multitude.

[1] Cic. in Topicis.

The proper effect of *fame*, is thus declared by olde *Grammarians* writing of the differences of ſuch words, as be of nere ſignification: [2] *Opinio oſtendit*; *Rumor tumultuatur*; *Fama indicat*. The opinion or weening of men giues an inckling; Rumour toſſeth a matter to and fro; but *fame* giues an euidence.

[2] Cornel. Fronto in differentijs.

And albeit *Plutarch* [3] do report, that this was a common prouerbe, πολέμου καὶ ἀκροάσεως πολλὰ τὰ κενὰ ὄχθων. *In warre and in heare-ſay be many vaine and vntrue matters:* yet the olde heathen *Poets* in an admiration of *fame*, doe attribute a kinde of diuine qualitie, and eternitie vnto it:

[3] Plutar. περὶ τοῦ ἀκούειν.

[4] Φήμη δ' οὔτις πάμπαν ἀπόλλυται, ἣν τινα πολλοὶ
λαοὶ φημίζουσι, θεὸς τίς περ καὶ αὐτή. *Fame being a thing which many people bruite abroad, doth neuer altogether fall to nothing: for it is of a certeine diuine nature.*

[4] Heſiodus.

And therefore by law [5] he that is mooued with *fame*, or by the aſſertions of men woorthy to be credited, is ſaid *not to be mooued vniuſtly, or without cauſe.*

[5] Arg. l. fin. ff. de hæred. inſtituendis.

Fames be of two ſeuerall degrees. The one riſing [6] vpon ſuſpicion onely, and from an vncerteine authour: and this is not of force to make ſuch proofe, that by reaſon thereof [7] the fault ſhould be ſtraightway beleeued, albeit ſuch *fame* be coadiuuant, vnto other proofes. And it worketh a *preſumption* onely, againſt the partie, [8] ſeruing to put him vnto his *purgation.*

[6] c. Sanctum. diſt. 4. de conſecrat.

[7] c. Cum in iuuentute de purg. Can. l. Decuriones. C. de pœnis.

[8] c. Tua nos. de cohab. cler. & mulier.

The ſecond degree in *Fame*, is when it ſprung vp and had his originall from a certeine and likely preſumption, and from probable matter. In which caſe it may of it ſelfe make proofe, either in a fact done long agone; (as to prooue by *Fame*, that a man is dead) or of a fact that [9] cannot eaſily (by direct proofs) be conuinced, but *preſumptiuely*; as the very fact of adulterie. For a *fame* with probable *preſumption* growing vpon ſome knowen acte comming neere vnto ſuch a crime, doth make proofe of the very fact; ſo that the ende of the proſecution be not of verie [10] great preiudice: as for example; It may ſerue for proofe of adulterie, to the effect of debarring a womans

[9] DD. in l. Siquidem. C. de adulter.

[10] L. vbi adhuc. C. de iure dot.

cohabitation or maintenance from her husband; but not [1] that ſhe may be puniſhed by death, where that penaltie is the *Ordinarie* puniſhment of that crime.

[1] D D. in c. Veniens de teſtib.

A *fame* may then be ſayde to be blowen abroad, not onely [2] when the greater part of the whole neighbour-hood or towne doe ſpeake thereof, as occaſion is offered: but alſo (in caſe the fact be of that nature, that [3] it is reſtrained but vnto certeine perſons, which by likelyhood may know of it) then is it a ſufficient *fame*, though none beſides the greater part of ſuch certeine perſons, doe ſpeake thereof. If it be bruited among ſome few onely, and not by the greater part of ſuch; then is it [4] properly to be termed a *Rumor* and no *Fame*.

[2] c. inquiſitionis. in fin. de Accuſ.

[3] Panor. in c. cũ oporteat. de Accuſ.

[4] c. ſuper eo. de eo qui cognouit conſang. vxor.

Now whenſoeuer a *fame* touching ſome offence, runneth againſt any perſon: the Iudge may thereupon ground his *Enquirie*. For it is the common opinion of writers [5] in thoſe lawes, that *Fame* doth ſucceed in place of an *Accuſation*. One reaſon hereof is, becauſe the very people among whom *fame* flieth, do ſeeme (in ſome ſort) thereby to preferre matter vp, againſt a perſon ſo infamed: which ought to be as ſufficient to excite the Iudge (knowing of it) to doe his *Office*, as if one certeine perſon or moe did *preſent* it vnto him. For by *fame* alone [6] an offence is ſayd to be made knowen vnto a Iudge, though not thereby to conuince the partie; yet to the entent of *Enquirie*, and of deſcending to a triall by that occaſion. And (as was afore alleged) [7] a man vpon *fame* alone, may be ſaid publikly detected of a crime.

[5] Card. A'exan. in c. de Accuſ. col. 14.

[6] Alph. Villag. li. 3. c. 6. conc. 3.

[7] Petr. de Palud. in 4. Sent. 19. q. 4.

Some *Diuines* (for the times they liued in) moſt excellently learned, could ſay [8] that *a publike fame concerning any crime doth ſtand inſtead of an accuſation*; and thereunto doe applie that of *Geneſis*, where the bloud of *Abell* is ſayd to crie out againſt *Cain*, when he had ſecretly murthered him. *What haſt thou done?* ſayd *God* to *Cain*. [9] *The voice of thy brothers bloud cryeth vnto me from the earth*: as if that crie of the bloud did occaſion the Lord to enter vnto the *examination* of the impeached perſon. Therefore doth *God* (though he knew all things) ſay vnto *Cain*; *What haſt thou done?*

[8] Thom. 2. 2.

[9] Gen. 4. V. 10.

If *Fame* be very brimme and rife, [10] then is it none iniuſtice for a Iudge (though he be but an *Ordinarie*, from whom an *Appellation* doth lie) to omit to make any proofe *Iudicially* in actes of

[10] Panor. c. Tertio loco. de probat. & c. Tuanos. de appellat.

of ſuch *fame*, before hee proceed. Albeit if an Appellation bee brought, he muſt then be able to prooue, that there was in trueth ſuch a *fame* before he proceeded. But if the *fame* be not ſo ſtrong and vehement; then it is expedient for ſuch a Iudge to haue the *fame* (being not preſented) to be in *Acles*, firſt *Iudiciallie* prooued, by depoſition of two witneſſes at leaſt. For [1] ſo many will ſuffice to prooue a *fame* (though they be none *Officers* thereunto aſſigned:) But two alone (where a greater number is) cannot make a *fame*.

[1] Clarus vbi ſupra.q.6.

But when the prince or ſuch magiſtrates (from whom none Appellation lieth) doe proceed vpon a *fame* not preſented; whether it be verie brimme and vehement, or otherwiſe: yet in them it is not requiſite to be prooued in *Acts* [2] that there was ſuch *fame* precedent; becauſe it is ſufficient to bee ſo, vpon information made knowen vnto them *extraindiciallie*. For the law preſumeth more ſtronglie for their integrities, and freedome from *Calumniation*, *Conſpiracie*, and wilfull vniuſt vexation; then of euerie inferiour *ordinarie Iudges*.

[2] Panor. in c. cum oporteat, de accuſationib.

That *Rule* which is ſet downe by Interpreters, that *A fame ought to appeare or be prooued, before a Iudge doe proceed, when as there is no Preſentment*; is ſubiect to diuers exceptions in lawe. For firſt, it hath [3] no place in the crime *of hereſie*, wherein (by the common opinion of writers) a vehement ſuſpicion (grounded vpon any credible relation) doeth ſuffice to begin a *ſpeciall enquirie*. Secondly, that *Rule* faileth [4] when *ſpecial enquiries* be framed either by commandement, or by knowledge of the prince himſelfe; ſo ſuch commiſſion be obtained *motu proprio*, & for the princes own ſeruice; but not at the inſtance of any partie particularlie intereſſed therein: and ſuch is the *Commiſſion eccleſiaſticall*. Thirdly, it holdeth not [5] when ſuch *enquirie* is made, not to the end of puniſhing *corporallie*; but of reforming the partie *ſpirituallie* for his ſoules health. Fourthly, *fame* is not required, [6] where the *enquirie* is neither made for any puniſhment *corporall* or *ſpirituall*; but onely to the end to find out, whether he that is preſented or elected to an eccleſiaſtical function, be worthie thereof or not. For in ſuch caſe, to the end of keeping backe an vnworthie perſon; the ſuperiour without either *fame* or other inducement, ought to enquire of *meere office*, very carefully touching him. But

[3] Felyn. in c. Qualiter. el. 2. de accuſat. Clar. q.6.

[4] Bald. in l. Nullus. nu. 1. C. ad l. Iul. Maieſt. Innoc. in c. cũ oporteat. nu. 5. de accuſat.

[5] Abbas. in c. 1. de offi. Ordinar.

[6] Innoc. in c. Qualiter. el. 2. de accuſat.

it is otherwiſe, when *enquirie* touching a fault is inſtituted againſt one that is already admitted into that function, whether the proceeding be then for his remooving, or for other puniſhment.

On the contrary ſide it is receiued by the lawe *Canon*, that albeit an euil *fame*, yea [1] though it be not *ſcandalous* and offenſiue, be ſufficient to ground *enquirie* againſt a priuate or commō perſon: yet euery *fame* (except it be alſo *ſcandalous*) will not ſuffice ſo to proceed againſt a *Prelate*.

[1] Panor. in c. qualiter. el. 2. de accuſ.

The whole courſe by lawe preſcribed touching *infamie* or *euill fame* going afore a *ſpeciall enquirie*, in other [2] realmes abroad (euen where the *Ciuill* and *Canon* lawes haue place) is long ſince quite growen in diſuſe and left vnpractiſed in both courts, not onely in thoſe excepted, but in all other caſes alſo beſides, as by ſundry writers of thoſe countries is teſtified.

[2] Clarus. vbi ſupra. q. 6. Alphonſ. Villag. paſſim.

Neuertheleſſe in the courtes *Ciuill* and *Eccleſiaſticall* within this Realme, this kind of proceeding vpon an *Infamie* according to the very preſcript forme of thoſe lawes, is ſtill required to be practiſed and obſerued. So that by this diſcourſe (how *fame* doeth open a way to *enquirie*) may appeare, the vntrue and iniurious *Calumniations* of thoſe men, who being led by ignorance, or ſome worſe matter; doe buzze abroad, that *Ordinaries* may make a *fame*, when and how often themſelues liſt. But if they could; to what purpoſe ſhould they be ſo vniuſtly minded, hauing (by lawe) ſo many ſundry other ſufficient inducements beſides *fame*, to ground their *ſpeciall enquiries* vpon; as partly haue bene, and partly yet remaine to be here opened?

For another & a ſecond means beſides *preſentmēt*, which doeth alſo opē way vnto *ſpeciall enquirie*, is *Clamoſa inſinuatio*, being not very vnlike to a *fame*, yet not the ſame. And it is, [3] *when as a Iudge ſtirred vp by ſundry frequent reports of credible perſons* (yet without their depoſitions) *doeth deſcend to ſpeciall enquirie, euen without any preferrer or proſecuter*. And this is to be done by him, whē as without *ſcandale* and offence, it cannot be diſſembled or winked at. For in this caſe, not only the iudge may, but alſo he ought to proceed vnto *enquirie of his meere office*, againſt him which is ſo detected and *ſcandalous*.

[3] c. qualiter. el. 2. de accuſ. & c. licet Heli. de Simonia.

A third means of grounding *ſpeciall enquirie* beſides *preſentment*, is *Cōplaint*, made either by *priuate Iudiciall*, or by *Canonicall denun-*

denunciation. For if ſuch be made (yea though no *fame* doeth appeare) the Iudge is bound [1] to frame *enquirie of Office* againſt the partie denounced; or els he is to be punished, no leſſe then he is to be, *when publike denunciation or preſentment is made by officers*, [2] if he ſhall not proceed thereupon. But the *priuate Iudiciall* and *generall Canonicall denunciation* doe herein differ from *publike denunciation*; becauſe after publike *preſentment* [3] bee made to the Iudge, the *Proſecuters* are not bound to deale any further therein, but doe leaue it to the Iudges *meere Office*: whereas in the other two *denunciations* laſt mentioned, the *Denouncer* doeth proſecute and ſollicite the *office*.

[1] Bald. in l. Mancipia. C. de ſeru. fugit. nu. 1.

[2] Bald. in l. inuenimus. C. de probat.

[3] Pract. Conradi, fol. 236. nu. 21.

[4] This *denunciation* commeth in place of a publike *fame*, and thereby openeth a way to *enquirie*. And by Cuſtome [5] now generally receiued in other countries, any man is admitted in this ſort to *denounce* an offender, no leſſe then thoſe which be *officers* ſpecially deputed.

[4] Clarus. ibid. q. 7.

[5] Alberic. in l. ea quidem. c. de accuſ. nu. 9.

The maner of preferring *denunciations* in the partes on the other ſide, is in effect thus: Hee that *denounceth*, [6] doeth make knowen to the Iudge in Acts, that at ſuch a time by ſuch a man, this or that miſdemeanor was committed; and that *N.* and *A.* &c. are more ſufficientlie informed in the particulars of that matter. In preferring vp *Preſentments* it is to be obſerued, [7] that if the crime be done by *committing* any thing; the place muſt bee expreſſed: but if by *omitting*; then the ſetting downe of the place, is not required of neceſſitie.

[6] Angel. de Maleficijs.

[7] Clarus. ibid. q. 12.

Here perhaps ſome will obiect againſt this, & all other means of opening a way to *ſpeciall enquirie*, beſides *fame*; ſundry ſpeeches of writers in both theſe lawes, whereby they doe ſeeme to require, that a *fame* neceſſarilie goe before euery ſuch *enquirie*. But we are taught [8] how they ought to be vnderſtood; & that in all ſuch places, they do but ſpeake thereof, as of one eſpecial and principall means, not excluding all other: and therefore muſt be thus takē: that by law a *fame* is but thē neceſſarily required; whē there is neither *denunciatiō*, *cōplaint*, nor any other means beſides, ẏ be allowed to be ſufficiēt, whereupō to groūd a *ſpecial enqurie*.

[8] Boſſius. tit. de Inquiſit. nu. 27.

A fourth means beſides *Preſentment*, whereupō a *ſpecial enquirie* may be entred vnto, are *Indicia*, ſo called *ab Indicando*, which (according as ẏ *engliſh* word ẇ vs is cōmonly vſed) I do interprete *Euidences*,

Euidences, or certaine markes and tokens. For when other inducements thereunto doe want, theſe may ſerue that turne. In which reſpect it is ſayd [1] that *Indicium ſufficiens æquiparatur Famæ:* a ſufficient euidence or ſigne is æquiualent vnto a *Fame*. Like as on the contrarie ſide, when ſuch euidence cannot bee had, a *Fame* may ſerue in ſtead thereof. Therfore in forreine parts where the courſe of hauing a *Fame* to go before *Enquirie ſpeciall*, is by cuſtome diſuſed: yet neuertheleſſe, if no ſufficient *Indicia* or euidences for the matter doe appeare; [2] euen in thoſe countries it is ſtill required, that at leaſt a *Fame* do run thereof. So that theſe and all the reſt of the meanes, that open a way vnto *ſpeciall enquiries*, are like the Phyſitians ἀντικαταλλάγματα; i. *things that may ſerue to be vſed, one of them in ſtead of another that wanteth.*

[1] Bartol. in l. congruit. ff. de offic. præſ.

[2] Alphon. Villag. lib. 3. c. 15. concl. 8.

Theſe *Indicia* be in lawe taken two ſeuerall wayes: either in a more large acception: as when they ſignifie ſuch *preſumptions* which be expreſſie ſet downe in law, to make a *full proofe*, [3] ſo that no proofes may be made to the contrary, commonly called *præſumptio iuris, & de iure:* or els they be of a more ſtrict and proper acception; importing ſome ſigne of a crime or other matter, [4] which may ſerue to the finding out of *Trueth*. And this ſorte of *Indicia* are to be conſidered in three [5] ſeuerall degrees.

[3] Arg. l. Indicia. 19. C. de rei vindicatione.

[4] l. Solent. ff. de Præſcript.

[5] Clarus. §. fin. q. 20.

The firſt are called *Leuia Indicia*, light inducements or ſuſpicions: The ſecond be *Probabilia Indicia*, more ſtrong & probable: & the third are *Indicia violenta, vel indubitata*; moſt pregnant and forcible euidences.

The firſt degree of them doeth produce theſe two effects; Firſt, that the partie detected may thereupon be arreſted & attached (by courtes hauing this authoritie) leſt he flie: and ſecondlie, that the Iudge may enter into the taking of further particular informations thereof *In proceſſu informatiuo:* but they are not ſufficient ſtraightway to frame thereupon *proceſſum punitiuũ*. For *to take further informations* [6] *onely touching a crime, any probable ſuſpicion ſuffiſeth; by which the Iudge may (with reaſon) be induced to beleeue, that the crime was cõmitted by ſuch an one.* And it is no maruel ỹ ſuch *reaſonable ſuſpiciõ* may ſerue a Iudge ſo farre, as to take further informatiõs; ſeeing it excuſeth an *Accuſer* frõ manifeſt *calumniatiõ* by *Tullies* iudgement, as he teſtifieth in theſe words. *It may happen* (ſaieth he) [7] *that a mã accuſed is innocent. But notwithſtanding*

[6] Salyceius in l. ea quidem. c. de Accuſat.

[7] Cic. pro Roſc. Amerino.

ſtanding he be cleere from the fault; yet is he not without ſuſpicion. In which caſe (albeit it be lamentable in reſpect of the accuſed:) yet the Accuſer (in ſome ſort) may for ſuch ſuſpicions ſake be pardoned. For ſeeing he hath ſomething to ſay criminouſly grounded vpon good ſuſpicion; therefore may he not be taken wilfully to miſuſe, and manifeſtly to calumniate or conſpire againſt him, which is guiltleſſe.

The ſecond ſort of *Euidences* (properly and moſt vſually termed by the generall name of *Indicia*) though they be of leſſe force, then to make *probationem ſemiplenam:* yet are they [1] ſufficient to ground a *ſpeciall Enquirie* vpon. *Inquiſitio poteſt fieri, quando extant indicia propinqua ipſi maleficio; quia tunc ſurrogantur loco infamiæ.* And of this ſort are thoſe lawes to be vnderſtood, [2] which affirme *Indicia non ſufficere ad conuincendum:* ſuch inducements are not ſtrong ynough to condemne a man. Yet [3] if moe of them together doe happen to fall out in one matter, each of them being ſeuerally (in his owne nature) perfect: then may they all be ioyned together, and may ſuffice to the condemning of him, vnto a *mulcte pecuniarie* or fine; but not to condemne him vnto any *corporall* puniſhment; ſauing when the *Soueraigne Prince*, or his *chiefe Counſell of State*, doe thereupon proceede. And yet euen in this Caſe, ſuch *corporall* puniſhment ought to be *extraordinarie* onely: that is, ſome leſſe and milder puniſhment, then the preſcript of lawe prouideth for an offendour in ſuch a crime; if he had bin conuicted either vpon his owne confeſſion, or by witneſſes; and not alone *per Indicia*; that is, but by *preſumtiue proofes*, or probable Euidences. For it is to be vnderſtood, that in moſt forreine partes, the maner of al puniſhments, are arbitrarie to the Iudge, according to circumſtances.

[1] Bartol in l. fin. ff. de Quæſtion.

[2] Panor. c. 3. loco de probat.

[3] Clarus. li. 5. § fin. qu. 63. & ibi remiſſiuè.

The third degree of them are ſuch, and ſo ſtrong euidences, as that not onely *ſpeciall Enquirie* for puniſhment may vpon any of them be framed: but the partie may [4] thereupon alone, be alſo condemned; as is commonly holden by writers in lawe; eſpecially in ſecret treaties, hidden crimes, and al ſuch, as (in their owne nature) be of difficult proofe.

[4] Practica. Can. fol. 72.

That ſuch *indicia indubitata* or violent preſumptions may ſerue for full proofe in matters of very difficult proofe, we haue an example in *Scripture* of *Salomon*; [5] whoſe wiſedome is therefore highly commended, becauſe he grounded his iudgement

[5] 1. Reg. c. 3. ℣ 27. c. afferte de præſumpt.

(whether of the two women that contended, was the true mother) vpon the motherly pitie which he found in her, that would rather forgoe her naturall childe, then to see it dismembred and parted in twaine.

Nowe because of this diuersitie among these *Indicia*, if any shal require a true note of distinction, how these three sortes may be exactly discerned one from another: it is to be answered, first generally out of the wordes of lawe: *Que* [1] *argumenta, ad quem modum probandæ cuiq; rei sufficiant, nullo certo modo satis definiri potest.* And according to this is the *Rule*; *Omnes probationes sunt arbitrariæ.* But particularly in this point, ye must knowe, that [2] *the whole matter Indiciorum*, of *Euidences, must be left to the arbitrarie iudgement of an vpright and sincere man, such as a Iudge is presumed to be: That hee according to the qualitie of the person, crime, and manner of the suspicions and presumptions may iudge, in which of these three degrees euery Indicium, or seuerall Euidence is to be taken.*

1 l. 3. § 1. ff. de Testib.

2 Angel. de malef. ver. fama publi. nu. 9. Pract. Casoni. fol. 14. nu. 2.

A fift meanes (besides *Presentment*) of opening way to *speciall Enquirie, in processu punitiuo*, is that detection which the *Grecians* call ἐπ' αὐτοφώρῳ. [3] So was the woman taken in the very acte of adulterie in the *Gospel*. The *Latines* terme it thus; *Deprehensio in flagranti crimine.* And vpon the borders of *England*, taking one *with the bloodie hand*; or (as it is more commonly expressed) taking an offendour *with the manner*. For of this it is testified, [4] that it openeth way to *speciall Enquirie*. And the like is to be saide, when a Iudge himselfe (sitting publikely) seeth some crime committed. Whereof writers in lawe doe assigne for reason (in this behalfe) the Iudges iust griefe, vpon the indignitie of the facte, and vpon the audaceous boldnesse of the offendour.

3 Ioan. 8.

4 Clar. ibid. qu. 8.

A sixth meanes producing *speciall Enquirie*, is *Notorietas facti, vel Euidentia sceleris.* [5] When the matter is so notorious, that by no colour or wrangling it can be concealed, shadowed, or excused; as when the whole people be able to testifie it. For then [6] (as saieth Saint *Augustine*) which saying is also repeated in the *Canon* lawe. *Euidentia patrati sceleris non indiget clamore accusatoris.* What shoulde a Iudge require an *Accusers* prosecution, where the crime is notoriously and plainely committed? So it is testified els where, [7] *Si crimen ita publicum est,*

5 Gynus in l. ea quidem. C. de accusat.

6 Aug. super Gen. c. euidentia. de accusat.

7 c. Tua nos. de cohab. cler. & mulier.

vt

vt meritò debeat appellari Notorium; in eo caſu nec teſtis, nec accuſator eſt neceſſarius; cum huiuſmodi crimen nulla poſſit tergiuerſatione celari. But this worde *Notorium*, hath three acceptions in Law. The firſt is *Notorietas vel euidentia facti*, whereof we here ſpeake. The ſecond is [1] *publicum vel Notorium per famam.* The third is that [2] *Notorium*, or (as others read it in the feminine gender) *Notoria*, which is a relation or a preſentment vnto a Iudge of ſome crime. And ſo it is taken in thoſe words of the *Ciuil law*, [3] *Nuntiatores notorijs ſuis aſſiſtere iubentur.* Preſenters, viz. voluntarie relatours and not *Officers* thereunto ſpecially appointed (except their *Calumniation* be manifeſt and apparant, as the beſt writers doe interpret) muſt make good and iuſtifie that which they preſent. And againe, [4] *Verùm ſi falſis necne Notorijs inſimulatus ſit, perpenſo indicio diſpicis debet.*

[1] c. Tua. ibid.
[2] l. Diuus. § Nuntiatoris. ff. ad S.C. Turpillian.
[3] l. ea quidem. C. de accuſat.
[4] Vide Auguſt. epiſt. 150. & 160. & Trebel. Pol. in Claudio.

Now the ſecond of theſe two *Notoria* doeth open ſufficient way to *ſpecial Enquirie*: but the firſt [5] ſerueth not onely hereunto, but euen to the conuiction alſo of ſuch *Notorious* offender. Yet before the party may vpon ſuch *Notorietie* be pronounced conuicted; it is required, [6] *that this Notorietie be made to appeare iudicially in Acles vnto the Iudge (vnto the ſpeeding whereof, the Defendant alſo muſt be called) and not onely by extraiudiciall information brought vnto him.* Vpon which *Iudiciall* [7] proceeding had, the Iudge, (before he proceede to *ſentence* of condemnation) muſt by *interlocutorie decree* pronounce ſuch a fact to be *notorious.*

[5] Clarus. ibid. qu. 9.
[6] Pract. Conrad. fol. 240.
[7] Ferret. Conſ. 31. nu. 3. & 35.

A ſeuenth meanes ſeruing to produce firſt *Enquirie in Proceſſu informatiuo*, and after in *punitiuo* is that, which is called *incidens cognitio:* when vpon examination of one offendour, it falleth out another of his complices to be diſcouered. For thereupon (as it is the common opinion [8] of writers) the Iudge may ground his further *enquirie* and taking of Informations; albeit the ſuppoſed offendour [9] be not at firſt cited thereunto. But this appeachment made by him that is partaker in a crime; is not to be holden ſo good, as the ſaying of a witneſſe, [10] but as of a bare Relatour: which yet may giue iuſt occaſion vnto the Iudge to enter into further *Enquirie* thereof, by taking Informations, as the ſaying of any other meane or bad perſon alſo might, in like caſe.

[8] Lud. Rom. in l. & ſi certus. ff. ad S. C. Syllan.
[9] Bart. in l. 2. ff. de adult. § ſi. publico.
[10] Clarus. ibid. q. 21.

An eight meanes to open way, and to occaſion the Iudges ſpe-

ciall enquirie *in proceſſu punitiuo* is, *Enormitas criminis*; the great heinouſneſſe of ſome crime. For it is holden, [1] that euen in ſtrict termes of law, againſt ſuch a grieuous crime, a Iudge hath power ſo to proceede, yea without any *fame* or *Indicia*, viz. Euidences iudicially proued and ſet downe in the Actes of the Court afore.

[1] Arg l. Si quis in hoc. C. de Epiſ. & Clericis. Bart. in l. 2. ff. ad l. Iul. de adulterijs.

Ninthly, the Iudge may lawfully deſcend to *ſpeciall enquirie of office*, if he ſhal perceiue the *Accuſer* [2] to *collude* with the accuſed or to goe about to tranſact, & by ſecret cõpoſition, to ſhut vp the matter betwixt them. So *if he which is ſuppoſed to be robbed,* [3] *will collude with the theefe, and ſay that he was not robbed: yet if there be likelihood to the contrary, he is not to be beleeued; but the Iudge thereupon is to make ſpeciall enquirie; Quia intereſt reipub. puniri furtum.*

[2] Alph. Villag. li. 3. c. 17. concl. 18.

[3] Bart. in l. inter omnes. § rectè. ff. de furtis.

A tenth meanes beſides *preſentment*, or any of the former, which may iuſtifie a Iudges proceeding in this behalfe, is when it is growen ſo farre (without [4] the defendants alledging) that none *infamie*, or any of the former meanes lieth againſt him, as that it is come to ſome act vſually ſpedde *poſt litis conteſtationem*, that is, after iſſue ioyned. For then (by the common [5] opinion of writers in lawe) it ſhalbe too late for the defendant to obiect the want of *fame*, and of other *Inducements*, &c. So that the proceeding (for want of the defendants reclaiming in time) ſhall ſtand ſound, and ſhall not be auoyded hereupon, for nullitie or any errour.

[4] gl. in c. 1. de elect. c. 2. de accuſ. in 6.

[5] Aretin in c. Qualiter. el. 1. de accuſat. Foller. Pract. cri. fol. 102.

The laſt occaſion of a Iudges iuſtifiable proceeding by *enquirie* againſt an offendour without any of the former inducements hitherto ſpoken of, is: when his proceeding [6] tendeth to a *fatherly and ſpirituall correction* for the ſoules health onely: and not vnto any *publike, corporall, and exemplarie* puniſhment. So that vpon all, which hath bin ſpoken in this behalfe, we may conclude in the very contradictorie of this opinion: *That a Courte eccleſiaſticall (by the lawes both Ciuill and Canon) may many wayes proceede againſt an offendour, without either Accuſation or Preſentment.*

[6] Alph. li. 10. concl. 5.

CHAP.

CHAP. VIII.

That to proceede ſometimes againſt an offence, otherwiſe then vpon an Accuſation *or* Preſẽtment, *or then vpon an* Appeale *or* Enditement *(which two at the common lawe haue reſpective correſpondence vnto the two former) is no* diuerſe, *much leſſe any* Contrarie *or* repugnant *courſe to the lawes, ſtatutes, and cuſtomes of this Realme. This is proued by common lawe, ſtatutes, and practice in proceeding* informatiue *and* punitiue: *with anſweres to certaine obiections made to the contrary.*

SEeing then that not only by *Canon*, but alſo by the *Ciuill* lawes (within the compaſſe of which two learnings *Accuſation* and *Preſentment* doe properly fall) there be ſo many other meanes beſides either of them, to open way to a Iudges proceeding againſt a crime: let it now be conſidered, why an *eccleſiaſtical* court may not be allowed an *eccleſiaſticall* courſe of proceeding; or whether by the ſtatutes or cõmon law of this Realme, an *eccleſiaſtical* Iudge be any way reſtrained and prohibited to proceede vpõ any other groundes beſides the one of them two. For if the *Common* or *ſtatute* Lawe prohibite this; then are ſuch *Canons, &c:* thereby in trueth reuerſed and voyd, as *contrary* and *repugnant* to the Lawes and ſtatutes of this land. But if no ſuch *contrarietie, repugnancie*, or *prohibition* ſhall be found: then will there be no cauſe, why the proceedings of Iudges *eccleſiaſtical* againſt Crimes, may not (in this behalfe) ſtil continue, as in all times by-paſt they haue done.

Notwithſtãding there be great *diuerſities* in proceedings *eccleſiaſtical* frõ proceedings at the *Cõmon* law; as in the frame of the *Libel*; in the anſwering of it; in the ioyning of iſſue; in the production, examination, & publication of witneſſes; in exceptions or chalenges againſt them, & Corroboratories of them; in the giuing of *ſentence* or Iudgement in writing, and in very many other points beſides, too long here to be rehearſed: yet ſuch *diuerſitie* alone notwithſtãding (ſo that the *Cõmon* law, or *ſtatute*, do neither *contrary* nor *contradict* them) thoſe proceedings ſhalbe neuertheleſſe iuſtifiable. For by ſtatute[1] *All ſuch Canons, cõſtitutions, ordinances, & ſynodals prouincial, being already made, which be not cõtrariant nor repugnant to the lawes, ſtatutes, & cuſtomes of this Realme,* [1] 25. H. 8. c. 19.

nor to the dammage or hurt of the Kings prerogatiue royall; ſhall now ſtill bee vſed and executed, as they were afore the making of that Acte, &c. So that no *Canons* eſtabliſhing proceedings onely *diuerſe*, but *Canons contrariant or repugnant to the Lawes, &c.* be thereby repealed. Nowe we are taught by the rules of *Reaſon*, that two propoſitions reteyning otherwiſe the ſame termes, the one being vniuerſally negatiue, and the other vniuerſally affirmatiue, be *contrariant* one to another. And though *in materia contingenti* both ſuch may be falſe; yet they can neuer be both of them true. Therefore if the one be true, the other of them muſt needes be falſe. For example of *contraries*; the *Common* Lawe holdeth that *All aduowſons or right of patronage may lawfully, and without Simonie, be bought and ſolde.* This propoſition then being true; the *contrary* propoſition hereunto, which is eſtabliſhed by the *Canon* Lawe: viz. that *no right of patronage may lawfully or without Simonie be bought and ſolde*, muſt needes be falſe; and therefore by the *Common* Lawe, doth ſtand in this Realme repealed, in reſpect of this *contrarietie*.

The word *Repugnant* in the ſaide ſtatute (we ſee) is put after *Contrariant*, as of a greater force and efficacie: and therefore is to be vnderſtoode, according to the common courſe of our ſpeach, (albeit the *Logicians* doe not ſo vſe that worde) for the *contradictorie oppoſition*; conſiſting of an *vniuerſall affirmatiue* and a *particular negatiue*; or of an *vniuerſall negatiue* and *particular affirmatiue*. And theſe be ſo oppoſite *ex diametro*, and doe alwayes ſo directly thwart one another; that in euery ſubiect matter whatſoeuer, the one of them being true, the other muſt needs be falſe: *& è conuerſo*. As for example; The *Canon* Lawe holdeth, that *All fighting in Duello*, that is to ſay, triall by battaile of one ſingle man againſt another, *is vnlawfull*. But the *Common* Lawe (*contradicting* this) doth holde, that *ſome triall by battaile* (as in a writ of right, and in an Appeale of murder or robberie) *is not vnlawful*. And againe, the *Canon* Lawe holdeth, that *none aduowſons or right of Patronages may be in groſſe*. But the *Common* Lawe is in the flat *Contradictorie* hereof, that ſome *aduowſons* be in *groſſe*, as well as others be *appurtenant to a manoure*. And therefore in neither of thoſe Caſes ſuch *Canons* haue place in this Realme, in reſpect of this *Contradiction* and *Repugnancie*,

If

If then it may be ſhewed, that ſome proceedings of the *Common* Lawe againſt crimes, be alſo entred into without either *Accuſation* or *Preſentment* going afore: then where the courſe of both Courts be not ſo much as *diuers*; there cannot poſſibly be found either *Contrarietie* or *Repugnancie*: vnleſſe we ſhould ſay, that the Lawes and ſtatutes doe condemne that, as vnequall and vniuſt in Courts *Eccleſiaſticall*, which they eſtabliſh and practiſe in *Temporall* Courts for good and iuſt.

As then an *Appeale* brought at the *Common* Lawe, doth moſt neerely reſemble an *Accuſation* in the *Ciuil* and *Common* Lawes: ſo hath *enditement* a correſpondence, and doeth anſwere vnto their *Preſentments*, being alſo in ſtatute, often called by the name of *Preſentment*. Theſe two kinds of proſecution of Crimes, at the *Common* Lawe be mentioned in a ſtatute of *K. Henry* the fift, in theſe words: [1] *Diuers men of malice and enmitie, and for gaine, and vengeance, haue often cauſed to be indited and appealed diuers of our true liege people, of treaſons or felonies in the Countie of Lancaſter; pretending by thoſe Appeales and Indstements, &c.* And though theſe two be the courſes of bringing a man in *proceſſu punitiuo* into trial of matters *Capitall*: yet for infinite other offences and crimes not *Capitall*, the *Cõmon* Law hath vſe of *Bils* in the *Starre-Chamber*, and of *Informations* in the other Courts, at *Weſtminſter*. Neither of which can be truely called either *Preſentment* or *Accuſation*. Not *Preſentment*, becauſe no ſuch peculiar charge of preferring vpon their oathes is layde vpon them, as is vpon *Iurors* at *Enqueſts*, that finde *Inditements*; or as is vpon *Church-wardens* and *Side-men*, who make *Preſentments*. Not *Accuſation*, becauſe (as is aforeſhewed) ſuch *Bils* and *Informations*, be both of them put vp, *ex officio promoto*. Againe, they cannot be called *Accuſations*, becauſe thoſe, who put them vp, are not *parties*; but the *King is the partie*. For it is thus ſaid in Statute, [2] *He that will ſue for the King to attaint them, that pay or receiue ſuch coyne* (as is there forbidden) *&c*; *ſhall haue the one halfe of the forfaiture*. And after in the ſame *Kings* dayes: [3] *He that will ſue for the King in this behalfe, ſhall haue the thirde part of that pecuniarie paine*. So that whoſoeuer doth preferre or follow them; yet the ſuite is the *Kings*, and he the *partie*; whoſe alſo the Court is, where the ſuite is proſecuted.

[1] 7. H. 5. ca. vnico.

[2] 3. H. 5. ca. vnico.

[3] 8. H. 5. ca. 3.

It

It may appeare, that at the *Common* Lawe, other meanes beſides *Appeale* and *Enditements* (which reſpectiuely doe reſemble *Accuſation* and *Preſentment*) be receiued to ground a Iudges *Enquirie* vpon, *in Proceſſu informatiuo*; whereupon alſo followeth oftentimes *proceſſus punitiuus*; that is, the triall of the Offender. As firſt, by the common cuſtome and practiſe of the land. For doe not ſome ſeuerall Iuſtices of the Peace, vpon their owne ſuſpicion conceiued, or vpon ſecret relation of others (whome they credite) ſend for men by warrant to be apprehended and brought afore them? doe they not take informations ſometimes againſt ſuppoſed offenders, vpon depoſitions of witneſſes, before the *partie* be ſent for? Doe they not alſo without any ſuch witneſſes, often-times examine the *partie* himſelfe, and (according to their diſcretion) binde him to the Peace, or to his good behauiour: or perhaps ſend him to the common gaole to be impriſoned? Doe they not receiue and ſometimes preferre and procure *enditements* to be found (as of common *Barattarie* and ſuch like Crimes) vpon their owne onely ſuſpicions, or by *information* of ſome one other (perhaps an enemie) and vpon other as meane preſumptions? Are not ſundrie perſons trauelling through ſome towne, or founde in ſome priuie ſearche lodging there (with good reaſon) oftentimes brought to a ſtraite examination and *enquirie* of matters *Criminall*; vpon the onely view of their perſons and deportment, without all further intelligence or cauſe of *ſuſpicion*? Yet be all theſe without *Appeale* or *enditement*; and many times vpon as light and perhaps lighter ſuſpicions, and informations leſſe likely and credible, then any be admitted (in like caſe) by the *Commiſſioners eccleſiaſticall*; and much leſſe by *Ordinaries*, who muſt (in caſe an *Appellation* be brought) in a more ſtrict courſe of Lawe, be able ſoundly to iuſtifie the inducements, that they had to leade them into thoſe criminall *queſtions* and *enquiries*. Yet vpon theſe grounds alone, not onely the apprehenſion of the *parties*, their examinations perſonall, and the taking of informations from others againſt them, is founded: but alſo (as often falleth out) other penalties and diſgraces be inflicted; as binding to the Peace, or to their good behauiour, making them to anſwere *enditements of Barattarie*, or ſuch like; impriſonment of them by a good ſpace, ſometimes till the next

Seſſions

Seſſions or *generall Aſſiſes*; and ſometime extending diſcretion euen to condemne men to be whipped publickely vpon the ſingle *Denunciation* of a woman being infamous, and partie in the pretended Crime: one who is as eaſie to be ſuborned to ſpeake and charge a man falſely, as to deale lewdly; and whoſe teſtimonie (though it were not ſingular) is of no weight and credite. Much leſſe therefore (being but one) ought ſhe to be taken for ſufficient to condemne any, flat contrary to Gods owne *Morall* Lawe.

I haue alſo knowen Articles put vp againſt a good Miniſter and Preacher, to haue bene reiected in reſpect of their inſufficiencie, by the *Commiſſion eccleſiaſticall*. Yet the ſame Articles (being preferred euen by his aduerſarie, but aſſiſted with ſome of countenance in the Countrey) haue afterwards ſerued to haue an *Enditement* found againſt him, to be a *Common Barattour*: yea by thoſe and before thoſe, who perhaps might all of them be apposed, to tell directly, what *Barattaria* truely ſignifieth and importeth; and whence it is deriued.

Likewiſe doe we not ſee, that vpon the like grounds to ſome of theſe, a man may be touched with great diſgrace and diſcredite; and that not vniuſtly? As when ſome great and potent man in a Countrey (againſt whom fewe or none there abouts dare openly deale) is put out of all *Commiſſions* and publicke charge in his Countrey, vpon priuate (yet credible) information giuen to ſome of the great officers of the Kingdome, touching his oppreſſion, or other ill demeanour of himſelfe?

Doe not the like grounds of *Suſpicion*, of priuate *Complaint* and *Information* exhibited vnto them, iuſtly and ſufficiently (often times) mooue and warrant the *Lords* of the *Counſell*, to call ſome great malefactours into *queſtion*, and to deteine them, till they be acquited or condemned by due triall?

Beſides this vſuall practiſe, doe not the very Lawes of the land allow of theſe and like inducements to take informations, and to *enquire* into matters *Criminall*? [1] For *in an Action of falſe impriſonment, it is a good plea for the defendant to ſhewe the felonie, and to pleade that he tooke the plaintife for ſuſpicion of ſuch felonie: per Frowick.* And why then, may not three or moe of the *Queenes Commiſſioners eccleſiaſticall*, be in reaſon as deepely

[1] 10.H.7.fol.17.

truſted vpon their ſuſpicions (though in trueth they vſe it not in this ſort) as ſome one ſingle Iuſtice of Peace may be, vpon his owne onely *ſuſpicion?* And is it not as likely, that they will haue as good ground of their *ſuſpicion*, as he hath of his; and as much care of Iuſtice and of their owne credite?

[1] 3.Ed.1.ca.12. In an old [1] ſtatute we finde, that *Notoriouſnes of a facte, an euill name of a man*, yea and *light ſuſpicion* alſo of *Felonie*, may any of them ſerue, *to impriſon a man.* Albeit in the two firſt caſes ſuch a perſon is by that ſtatute appointed to endure *hard and ſtrong impriſonment:* yet aske whether in the originall Rolles, this ſtatute doe ſpeake of *impriſoning*; or elſe of *ſtrong and hard pœnance*, which ſuch be appointed to ſuffer, that *refuſe to be iuſtified by the Common lawe of the land.*

And as theſe and like inducements doe ſerue to ground the *proceſſe informatiue:* ſo doe they no leſſe, euen *in Proceſſe punitiue*, when the *enquirie* and examination is to puniſh the offender. For if any the Iudges at *Weſtminſter or of Aſſiſes*, haue iuſt occaſion of *ſuſpicion* miniſtred of a miſdemeanour to be committed by ſome belonging to that Court, touching matters of their Courts and preſent iuriſdiction: may they not, and is it not vſuall with them, euen hereupon onely, without any *enditement* or other *proſecution* of *partie*, to call ſuch ſuppoſed offender vnto *examination* before them, to the effect of *puniſhing* him, according as the qualitie of the facte ſhall fall out to require?

[2] 19.H.7.ca.14. In the time of *King Henry the ſeuenth* it was prouided by [2] *Parliament*, for ſuppreſſing of *Retainours*; *That two Iuſtices (whereof one to be of the Quorum) might call all ſuch perſons, as they ſhall thinke to be ſuſpected of any Retaynour, and them to examine of all ſuch Retaynours by their diſcretion: and their certificate into the K. Benche againſt all of them ſo examined, and by that examination found in default, to be againſt them as a conuiction: and their certificate of any perſons by that examination accuſed to be Retainours, to be of like effect and ſtrength againſt them, as an Enditement.*

[3] Ibidem. By the ſame it was alſo [3] enacted, that ſuch *Iuſtices* (as afore) *or the Lord Chaunceller, or Lord Keeper, or three of the Kings Counſell attending him, ſhoulde haue full power and auctoritie without any ſute or information made or put before them or any of them, to ſende for by Writte, Sub pœna, Prinie ſeale, Warrant, or otherwiſe*

by

by their diſcretion, for any perſon ſo offending; and the ſame perſon to examine by othe or otherwiſe by their diſcretion: and to adiudge ſuch as ſhould bee founde guiltie by verdict, confeſſion, examination, proues, or otherwiſe, in the forfeitures and paines, as though they were condemned after the courſe of the Common lawe, &c. So that it was thought then by the whole ſtate of the *Realme*, none vniuſt courſe (no not in a *Temporall* Court) for Magiſtrates to call ſome offenders into *queſtion criminall*, whom they did but *thinke to be ſuſpected*, and to condemne them without either *Enditement, Appeale, ſuite*, or *Information made*.

By a Statute made in her *Maieſties* time it is enacted; [1] *That if any man be in priſon for ſuppoſed ſpeaking in behalfe of forreigne Supremacie, and happen not to be endited within one halfe yeere of the offence committed; that then he ſhall be ſet at libertie.* Whereby appeareth, that a man may happen to be brought into *Queſtion criminall*, and to be in priſon alſo (which is an Attachment, and ſome puniſhment) without any *Enditement* or *Appeale* precedent. [1] 1. Eliz. ca. 2.

The ſtatute for [2] *Uniformitie in Common prayer*, mentioneth three meanes of *Conuiction* by the courſe of the *Temporall* lawe: viz. *Verdict of twelue men; the parties confeſſion; and the notorious euidence of the facte.* If then the *Notorious* euidence of the fact without *Appeale* or *Enditement*, *Verdict*, or *Confeſſion*, may (at that Lawe) ſerue for a *Conuiction:* may it not with as good iuſtice, and equitie ſerue for the ſame purpoſe, at the *Eccleſiaſtical* lawe, without either *Accuſation* or *Preſentment*? [2] 1. Eliz. ca. 2.

If here it be ſaid by any, that though ſuch practiſe of *Temporall Iudges* be lawfull, and the Lawes and Statutes be iuſt in this behalfe; yet perhaps the *Common* Lawe will not giue ſo large a ſcope vnto *Iudges eccleſiaſticall:* againſt ſuch doubters I will obiect thoſe wordes of [3] *Magna Charta*, where it is not a newe graunted, but *Confirmed* onely, *That for euermore the Church of England ſhalbe free, and ſhall haue all her whole rights and liberties inuiolable.* And this is a confirmation of their rights and liberties, before any *graunt* was made to the reſt of the Realme beſides: being yeelded at ſuch time, when as (through generall ignorance) it was vntruly holden, that the ſtate *Eccleſiaſticall* (ſignified there by thoſe wordes, *The Church of England*) had [3] Magna Charta, cap. 1.

not their Iuriſdictions from the Prince, but from God alone, deriued downe to them by the meanes of the *Pope:* and therefore that their *Courtes* and *Lawes*, (whereby they proceeded) were not in any reſpect to be accounted for *Courts* holden by the *Kings auctoritie*, or their Lawes the *Kings Lawes.* Whereupon aroſe that vntrue and preiudiciall phraſe of ſeuerance of a *Court Chriſtian*, from *the Kings Court.* So that if they were confirmed to them, when their Iuriſdictions (in facte) were not holden of the King, as now they be, and ought to be by Gods Lawe: is there not then more iuſt cauſe ſo to continue them at this time; ſeeing they be not ſo much as *a diuerſe* courſe from the *Cuſtomes* and Lawes of the Realme in Courts *Temporall?*

But that this courſe of proceeding in cauſes *Criminall*, ſometimes without either *Accuſation* or *Preſentment*, is in trueth *a right and libertie of the Church of England*, may appeare by that, which to this point hath bene afore deliuered; and by the continuall practiſe alſo of thoſe Courts, in all ages: as the *Acts* thereof from time to time doe make very manifeſt.

Yet, this is more particularly and neerely prooued, in the very point that we handle, by a [1] ſtatute made in her *Maieſties* reigne; where it is prouided, that *Ordinaries not only at any other time and place, then at their viſitations and Synods may take accuſations and informations* (a word of farre more large ſignification, then *Preſentment:*) *but may alſo enquire elſe-where within their iuriſdiction.* Which *Enquirie* is afore ſhewed to be alwayes *ex Officio*; and (being abſolutely ſpoken without further addition, and in ſome ſort ſeuered from all kinde of *Informations*) muſt neceſſarily be without *Preſentment.*

[1] 1. Eliz. ca. 2.

But how farre and in what maner may they ſo doe? Truely *in like fourme as heretofore hath bene vſed in like caſes, by the Queenes eccleſiaſtical Lawes.* If then to proceed *Criminally* without either of them two, be warranted & practiſed *by the Queenes eccleſiaſticall Lawes* (as afore is ſhewed) aſſuredly this Statute doth auouche and iuſtifie them.

To this diſputation may be referred that obiection, which the *Notegatherer* maketh touching a [2] ſtatute of *K. Henry the ſeuenth*; whereupon (he ſaith) *Empſon and Dudley* proceeded, that was [3] repealed by another in the time of *K. Henry the eight*; although he

Note gatherer.

[2] 11. H. 7. ca. 3.

[3] 1. H. 8. ca. 6.

he putteth it vnder his title of *the lawes of England*, as by them ſeeking to impugne al proceeding *ex officio*; albeit vnder *preſentment* (which this opinion alloweth) proceeding *ex Officio*, is neceſſarily implied, and preſuppoſed.

For anſwere whereof; it is true, that the ſaide ſtatute was ſo repealed: but whether it were the ſame and the onely ſtatute, whereupon *Empſon* and *Dudley* proceeded, is left there vncertaine and vntouched. Howſoeuer it was in this behalfe, ſeeing it authoriſed all *Iuſtices of Aſſiſe* and of the *Peace*, to proceede thereby; it is moſt probable, that many beſides them two, did alſo deale by vertue thereof.

The effect of the ſaide ſtatute was, that *vpon information to be made for the King afore Iuſtices vpõ any penal ſtatute not extending to life or member, they might (without enditement) heare and determine all offences againſt the forme of any ſtatute in force.*

The reaſon of making the ſaid ſtatute, is ſignified by the preamble to haue bin; for that, *although at Seſſions charge was giuen to enquire of many offences againſt ſtatutes; and Enqueſts to that effect were ſtraightly ſworne and charged to enquire and to preferre the trueth: yet they were letted to be found by imbracerie, maintenance, corruption, and fauour; by occaſion whereof the ſtatutes coulde not be put in due execution.* And againe in the ſame place: *The twelue men, for the cauſes afore rehearſed, will not finde, nor preſent the trueth.* Howeſoeuer this were at that time, it may bee feared, that it is in ſome place too true ſtill, euen vntill this day. So that if this were then a ſufficient cauſe to make ſuch a ſtatute; the cauſe ſtill continuing, if not encreaſing; that ſtatute will ſeeme to haue beene (in that regarde) leſſe vnreaſonable.

In the ſtatute of *Repeale* thereof, for the reaſon of abrogating it, is onely aſſigned; *That thereby many ſiniſter, craftie, feigned, and forged informations haue beene purſued, to the great damage and wrongfull vexation of the ſubiectes.* But this might aſwell happen, euen when men be proſecuted by way of *enditement*. For is it not vſuall to finde them vpon any one mans euidence and information, the *Iurie* not regarding (oftentimes) what enimitie reſts betwixt them? Therefore it was not the courſe by *information* that diſpleaſed; but the badnes of the *informations* 1.Hen.8.c.6.

31. Hen. 8. c. 14. that gaue occaſion of repeale. For by ſtatute, euen in *K. Hen. 8.* his dayes, an *Information* was made equiualent *vnto a preſentment by verdict of twelue*, in matter of *hereſie*, that is far more penal, then the former. Which cruell ſtatute I would not haue alledged, but that the *Note-gatherer* groundeth himſelfe thereupon, for another purpoſe.

And we ſee, that there is no ſuch cauſe alledged, as the *Note-gatherer* inſinuateth; either as if it were an vniuſt & vnreaſonable courſe, or in reſpect that it was *ex officio*, at the inſtigation and ſolicitation of ſome one perſon; or yet, that it was without *Appeale* or *Enditement*. For if it had bin ſimply vniuſt; then all the treaſure which had bin leuied by colour thereof, ſhould haue bin reſtored. And it is euident, that *Bils* and *Informations* againſt *offenders*, are ſtill in frequent vſe, and may be preferred for the Queene by any, and againſt any, whomſeuer. And thoſe which be found *offenders*, may (without either *Appeale* or *Enditement*) be condemned and puniſhed thereupon in ſundry geat penalties and loſſes both *pecuniarie*, *corporall*, and of their good name and credite.

And for further proofe, that it is at this day holden none-vniuſtice by the *temporall* lawes for to ground an *enquirie*, yea, and alſo a *Conuiction* without either *Appeale* or *enditement*, is plainely

5. & 6. Edw. 6. cap. 25. prooued by a latter ſtatute, which is yet in force. For *Iuſtices of Peace at their Seſſions haue authoritie to enquire of the offences of them, which be admitted to keepe Ale-houſes, not onely by Preſentment, but by Information, or otherwiſe by their diſcretion &c. and may heare and determine the ſame by all ſuch wayes and meanes, as by their diſcretion ſhall be thought good.* And a litle after it is there enacted; that *the Certificate of the Iuſtices touching euery ſuch Recogniſance and offence, ſhall be a ſufficient conuiction in the lawe of ſuch offence*. So that for this one kinde of *offence*, as much is eſtabliſhed by this ſtatute, as was for ſundry others, by the aforeſaid repealed Acte. And therefore it is no courſe of proceeding condemned as ſimplie vniuſt; howſoeuer the famous *King Henrie* the eight, was willing at the very entrance of his reigne, to gratifie his ſubiectes by that *Repeale*.

Another obiection in this behalfe is taken out of the *preamble* of the repealed ſtatute for *hereſie*, made in the time of the aforeſaid king *Henrie* the 8. the wordes are theſe: viz. *It ſtandeth not*

25. H. 8. ca. 14.

with

with the right order of Iuſtice, nor good equitie, that any perſon ſhould be conuict, and put to the loſſe of his life, good name, or goods; vnleſſe it were by due accuſation and witneſſe, or by preſentment, verdict, confeſſion, or proceſſe of outlawrie. Which wordes (you ſee) doe ſpeake *of conuiction, and of being put to loſſe* of one of thoſe three, and not of the calling into queſtion and maner of proceeding. This doeth appeare, in that to the worde *Accuſation* is ioyned *Witneſſe*, with a copulatiue: whereas the opinion (whereof we treate) implieth, that either vpon any *Accuſation* or yet vpon *Preſentment* (without any more adoe) an *Ordinary* may grounde his further proceeding. But a man may not be *conuicted* in a Court *Eccleſiaſticall*, either vpon a bare *Accuſation* or *Preſentment* without *witneſſes*, or his owne *confeſſion:* to which (I thinke) may well and with good reaſon be added, *wilfull contumacie*, and not *preſumed* onely; which *contumacie* both in *Eccleſiaſticall* Courtes, and ſome others of this Realme, amounteth to as much (in conſtruction of lawe) as a *confeſſion:* and it hath a correſpondence vnto an *Outlawrie*, that is a kind of conuiction, at the *Common* lawe, grounded vpon wilfulneſſe onely preſumed.

Moreouer, this *preamble* doth not reſt in the two wordes of *Accuſation* or *Preſentment*, being the onely things required (by this opinion) to warrant proceeding *Eccleſiaſticall*; but addeth alſo *witneſſe, verdict, confeſſion*, or *proceſſe of outlawrie:* and therefore cannot (by any meanes) be referred vnto *enducements*, to ground proceedings vpon, but onely vnto meanes of *conuiction:* and the rather, becauſe in that whole ſentence, no *verbe paſſiue* is vſed, but *conuicting and putting to loſſe, &c.* which maketh me the more to maruell, how the word *Preſentment*, with a diſiunctiue, came in amongſt the reſt: as if by a *Preſentment* alone, a man might be *conuicted*, or *put to loſſe* of any of theſe three.

Some other wordes following in the ſame *preamble*, are alſo brought for this purpoſe, viz. wherefore *it is not reaſonable, that any Ordinarie, by any ſuſpicion conceiued of his owne fantaſie without due Accuſation or Preſentment, ſhoulde put any ſubiect of this Realme, in the infamie and ſlaunder of hereſie, to the perill of loſſe of life, loſſe of name and goods.* Theſe wordes are inferred vpon the former, and are directed vnto none other crime but *Hereſie*, Ibidem.

where

where the perill and penaltie is ſo grieuous, as *loſſe of life, loſſe of name and goods*, ioyntly together; & therefore can by no reaſon be drawne & ſtretched vnto euery other crime *eccleſiaſtical*, where no ſuch perill of penaltie, or of puniſhment reſteth. For wordes of ſtatutes are of *ſtrict* interpretation, and are moſt *ſtrict* in matters criminall and penall, and therefore may not be extended vnto other crimes, then are expreſſely mentioned; yea though there were (in both) a like reaſon. Whereas (in trueth) betwixt the puniſhment of *Hereſie*, *Atheiſme* or *Apoſtacie*, and other crimes *eccleſiaſtical*, there is as great diſſimilitude as may be. For death in thoſe three is not inflicted, but when all hope of amendement and reformation of the partie himſelfe is paſt, and he is therefore taken away by death, to the intent others may be terrified by the example, and that he haue none opportunitie to entiſe any moe to his hereſies, or to continue in his blaſphemies againſt God. But in the correcting of all other *crimes eccleſiaſticall* (though ſecondarily ſometimes the terrour of others is ſought) yet principally the parties owne reformation, and bringing vnto penitency and amendement, is intended. For hereby he ſuſtaineth no loſſe at all, not ſo much as of his good name, but rather a gaine; becauſe after his reformation and repentance, he ought to be (of al *Chriſtians*) holden as deare and precious in Gods ſight, as if by falling into the ſinne, his credite had neuer bin impaired. In which reſpect thoſe *Canonicall penances* were by the fathers of the Church, and by the olde and pure *Canons* ſaid to be *medicinæ animæ*, rather then *pœnæ:* yet not as *ſatisfactorie for the ſinne*, but as good inducements vnto, and alſo teſtimonies of repentance.

The Angels reioyce at the conuerſion of a ſinner.

And you knowe, how abſurd a kind of reaſoning it is, either to argue from one thing to another *à diſſimilibus:* or to reaſon from that which is more likely to be, vnto that which is much leſſe likely (viz. *à maiori ad minus*) affirmatiuely, as muſt needes be out of this place: for thus their obiection muſt bee gathered: *Without accuſation or preſentment of hereſie; none ſhalbe put in perill of loſſe of life, loſſe of name, and goods: therefore without the one of theſe two, an Ordinarie may not proceede to the puniſhment of any other leſſe offence eccleſiaſticall. Yea though no one of theſe three, and much leſſe all of them be any way thereby hazarded, or brought into perill.*

Furthermore

Furthermore in theſe laſt recited wordes there lieth a plaine oppoſition, betwixt *any ſuſpicion conceiued of the Ordinaries owne fantaſie:* and *a due accuſation or Preſentment.* Therefore, if ſound and credible information, notice, euidence, or other ſufficient matter may appeare to be brought vnto him, ſo that hee cannot be ſayd *ſuſpitiouſlie to conceiue it of his owne fantaſie onely*, then the true intent hereof is thereby ſatiſfied. But ſhall the *Preamble* of this repealed Statute ſtand for ſound authoritie, and ſhall not the equitie and reaſon of the very bodie of the Statute it ſelfe, *11. H. 7.* though afterward repealed (much rather then a *Preamble*) be receiued for a good argument; prooving that it is neither vniuſt nor vnreaſonable, at ſome times to ground a Iudges proceeding *criminall*, without either *Appeale* or *Indictement?*

Laſtlie, here ſeemeth *a due accuſation* or els *a due Preſentment of Hereſie*, in reaſon and equitie to bee required: but it is not here, neither (as I take it) elſe-where by the lawes of the Realme determined, what may bee accounted *a due accuſation* or *a due Preſentment* of a crime in an Eccleſiaſticall court. Then (as I conſtrue the lawe) muſt it bee left vnto the lawe *eccleſiaſticall* to determine, when theſe may bee ſayd to bee *duelie* done, either preciſelie, or by that which is æquiualent vnto them.

And ſo we may conclude, that to proceed in an Eccleſiaſticall Court againſt a crime, otherwiſe then either by *Accuſation* or ſuch *Preſentment*, is not contrary or repugnant vnto the lawes of the Realme, but rather the like courſe often practiſed by them: and thereby the Iuſtice & equitie of ſuch proceeding more ſtronglie confirmed and iuſtified vnto vs, and the contrarie opinion quite ouerthrowen.

CHAP. IX.

The ſecond opinion (here to be treated of) is, that No laie perſon may be cited of Office in any cauſe, but Teſtamentarie or Matrimoniall: *the drift of that opinion is againſt proceeding of* Office *in matters* criminall: *the neceſſarie vſe and equitie of proceeding criminallie, ſometimes by the* Iudges office, *in courtes both* temporall *and* eccleſiaſticall.

THe very drift of the ſecond opinion (that commeth here to be diſputed of) is; that a *Iudge* eccleſiaſticall may not proceed at all of *Office*, or make *ſpeciall Enquirie*, (which is the effect produced by that cauſe) *againſt any crimes or offences of laie perſons*. For in debarring them frō *Citing* any ſuch, the very whole proceeding againſt them (vnto which that is the introduction) is thereby alſo debarred: and by reſtraining their *citing of Office* vnto cauſes onely *Teſtamentarie* or *Matrimoniall*, all dealing againſt *Crimes* (without there be an *Accuſer*) is thereby taken away. Which ſecond opinion therfore quite ouerthroweth the *preſenting* of any *laie perſons* (though criminous) allowed by the generalitie of the next precedent opinion; inſomuch as vpon *Preſentments*, followeth proceeding *of Office by Enquirie*; and yet both theſe opinions had one *Author*. So well bee theſe mens conceits digeſted. But let vs firſt examine what may be the colourable occaſion of this ſecond opinion, ouer and aboue the impounding of all *eccleſiaſtical* proceeding vnto thoſe two heads (ſpoken of in the firſt part) ſauing where the partie conuented himſelfe is willing. Which willingneſſe in the partie *for rights* that may be ſuppoſed to be by him deteined; but eſpecially for *crimes* ſuppoſed by him to bee committed, can neuer with any reaſon be intended, that it ſhall bee obtained at his hands (conſidering there is ſo ſmall vſe of any proceeding by *office*, but againſt *crimes*; and leaſt of all in cauſes *Matrimoniall* or *Teſtamentarie*.

That no *laie perſons* then ſhould be delt with at all, for ſuch crimes, as I haue before prooued to bee of eccleſiaſticall cogniſance; but be ſuffred to do them without controlment: I thinke (in charitie) not to be their meaning. It muſt needs then follow, that it is the proceeding againſt crimes *ex officio Iudicis*, viz. without

out an *Accuſer*, which is hereby principallie condemned, as vnreaſonable or vniuſt.

Therefore to prooue it *reaſonable*; I mind here (ſomewhat further) to ſhew the neceſſarie vſe & equitie thereof, as well in the one court as in the other. And to cleare it from *vniuſtice*; I wil declare firſt, that it is both practiſed by the *temporall* lawes, & alſo is by *common* and *ſtatute* law, an allowed proceeding vnto courtes *eccleſiaſtical*: next, that it is practiſed not onely by the law *Canon* (which many would take for a ſufficient diſallowance of it:) but alſo by the *Ciuill* lawes, ſubiect to no ſuch exception; inſomuch as they are vſed by the reſt of *Chriſtendome* for their Common law, by the grounds whereof, all their cuſtomarie lawes & ordinances be argued & diſputed. And laſtly, that ſuch courſe of proceeding was vſed & is allowed by ſundry exãples in holy *Scripture*: together with anſweres vnto the obiections made to the contrary, as they fall fitteſt into each of the ſeuerall parts of this diſputation.

The equitie and neceſſarie vſe of this courſe to bee holden, may be ſhewed by the *partie*, which (by lawe) is ſuppoſed to be the exciter & ſtirrer vp of a Iudge vnto it, whẽ none other perſon is found that wil proſecute. This partie I meane, is the [1] *publike intereſt* which the Church or Commõ welth hath, to haue crimes puniſhed: *Intereſt Reip. prouinciã purgari malis hominibus: & ne maleficia remaneant impunita: pœna enim vnius, terror eſt multorũ. Bonis nocet, qui malis parcit. Sicut eſt miſericordia puniẽs, ſic eſt crudelitas parcens:* w ſundry other like rules of law & *Canon*, partly afore touched. Now the *publike intereſt* doth not only reſt in this, when ſome benefite is comming towards the common treaſure, but is chieflie ſhewed by procuring common tranquillitie and repoſe of the ſubiect; with ſinceritie of religion, and integritie of conuerſation. And it was called by the *Romanes* (eſpecially after the popular ſtate was turned into a *monarchie*) by the name of *Fiſcus:* and may well and ſignificantly with vs (in reſpect of the meaning) be termed, the *intereſt of the crowne & dignitie royall*, which by all offences are ſayd to be violated. Therefore doe the [2] *Ciuilians* of other nations ſay, *In quocunq; crimine fiſcus eſt accuſator; againſt euery crime the benefit of the Common-wealth is an accuſer.* And another [3] ſaieth, that *in what crime ſoeuer a Iudge may proceed*

[1] Clarus, ibid. q. 7

[2] Practica Millei fol. 3. nu. 31.

[3] Clarus. ibid. q. 10.

of office, there Fiſcus, the common benefite ſtands in ſtead of a Partie. And it is teſtified to bee a [1] common rule, that euen *in an offence but againſt a priuate perſon principally, the iudge oftentimes is of office to proceed to the inflicting of ſome penaltie not expreſſie ſet downe in lawe, againſt ſuch an offence* (for ſo is *pœna extraordinaria* ment in the Ciuill lawe) *by reaſon of the very intereſt the Common wealth hath, to haue miſdemeanors puniſhed.* In which [2] reſpect *ſome mã that by law may not vſe action, yet is not forbidden implorare officium Iudicis*, to ſtirre vp the Iudge (by petition) to proceed for his owne *office and duties* ſake.

[1] Decius conſilio 170. nu. 1.

[2] Clarus ibid. q. 12.

If her Maieſties moſt honourable *councell* together, and euerie one apart; if the *Iudges* of the land; if carefull and vpright gentlemen of the *Commiſſion of Peace* in euery countrey; *of office*, and for their *dueties* ſake (for the moſt part) without any ſo much as priuate complaint (much leſſe profeſſed *Accuſer or Partie*) but perhaps vpon ſome generall muttering; yea and ſometimes without ſo much, for a care and vpon a feare (at large) onely conceiued, what may happen: did not, or ſhould not enquire, looke into, and take informations of riots, violences, diſturbances of peace, conſpiracies, felonies, murders, and of other miſdemeanors and outrages, and ſo ſeeke further to diſcouer them, and to puniſh them, or bring them to *Iuſtice*; might it not iuſtly be feared, that the realme would much more abound, and ouerflow in all kinde of miſchiefe? Would the *Conſtables* abroad, *Headboroughs*, *Burſholders*, and ſuch other inferior *officers* and miniſters of themſelues preferre ſuch vp, or being found out and *preſented* by others; would they effectually folow and proſecute them as appertaineth, ſo that the magiſtrates need not to take further care? I thinke it will not be ſo ſuppoſed. The like then may be ſayd of Eccleſiaſticall *officers* and *offences*, notwithſtanding all generall *Enquiries* in *Senes* or *Synodes*, and in *viſitations*.

But it will perhaps be ſayd; in the one Court, they may bee *preſented* by the ſworne men, and in the other by *enditement* of the grand Iurie, at Seſſions and Aſſiſes, &c. It is true, they may be; but how many, I pray you, are ſo found out, and endited (from time to time) by the *grand Iuries* of their own *enquiries* & knowledges: if either ſome partie (grieued in particular) doe not

giue

giue euidence; or the *Iudges* or *Iuſtices* of themſelues do not informe them, and vrge them; notwithſtanding the ſtraitneſſe of their charge and oath, and that they be taken out of the ſeuerall parts of euery ſhire? But be it, that ſome notorious murtherer or felon, is ſo by them *endited* at ſome times: how many other offenders in *penall ſtatutes* (being men of any reckoning in the ſhire) are *endited* at all, thorowout the Realme, in many yeeres, if none of the bench do take care to vrge the Iuries? as *Recuſants* in comming to diuine ſeruice, ſuch as haue and keepe *Reteiners*, and giue liueries contrary to ſtatute, onely to band in quarrels, and to mainteine bad actions; or yet ſuch as goe exceſſiuely in apparell, or which violate the ſtatutes appointed for not eating fleſh, vpon certeine dayes. Nay, it falleth out often times, that the more to giue edge to ſuch *Iuries* to do their duties, euidence hath bene giuen vnto them in theſe offences: yea, ſuch and ſo good, as vpon leſſe euidence, they would perhaps haue *endited* a man of *felonie*, to the hazzard of his life, eſpecially if he were but ſome baſe fellow. Now, when none almoſt will be found to giue *euidence* (ſauing in ſuch a cauſe where he findes himſelfe or ſome of his pinched) yea, and not in ſuch neither, if the other partie be a man of any tolerable reckoning or ability; and very few (albeit themſelues do perfectly know it, or haue reaſonable good euidence giuen, againſt ſome man of power) that will finde an *enditement* againſt ſuch an one, although both he that giueth the *euidence* ſecretly, and all the *Iurie* may be in ſome hope, not to be knowen, who it was that did principally ſtirre in it, becauſe they be ſworne to keepe the *Queenes* counſell, their fellowes, and their owne: can it then with reaſon be imagined, that any man (almoſt) will be found voluntarily to become an *Accuſer*, and to proſecute at his owne coſts and charges? Experience teacheth that moſt men will not, few that dare, and thoſe onely ſuch, as take themſelues in ſome particular reſpect, wronged.

We ſee in a great multitude of penall ſtatutes at the *Common* law, how men by *third parts* and *moities* of forfeitures (beſides great *priuileges* in proceeding) are as it were allured and entiſed to informe againſt offenders: yet very few (notwithſtanding ſuch great gaine as thereby might be got) are found (be-

ſides ſuch as make an occupation of it) that will voluntarily preferre *informations:* albeit there be enow that want the money, and could well be content to finger it, out of what malefactours purſe ſoeuer it came.

The reaſons of this backwardneſſe in informing, I take to be the charge, trouble, common obloquie, and offence taken by them *that be proſecuted*, and thereby feare and perill to come vnto ſome further miſchiefe vpon their procurement, or for their fauour. Now, where men that are ſo well hired, and (by reaſon the *Queene* is *partie* to ſuch *informations*) ſo fully in all reaſon protected, will not, luſt not, or dare not preferre matter *penall* againſt others: ſhall wee looke for better courage to be ſhewed by priuate perſons, againſt offenders in *Eccleſiaſticall crimes*; where they can expect no ſuch countenance nor remuneration, to lighten the other burthens and dangers? and therefore either of *Office* to be proſecuted, or muſt be wholly left vnpuniſhed.

In riots committed and done vpon others, we ſee iuſt cauſe of griefe for the iniury receiued: and thereby occaſion giuen to ſeeke lawfull reuenge. There was good remedy alſo prouided for them at the *Common* law. Yet in the time of king *Henrie* the ſeuenth, for a further remedie and repreſſing of them by the *Lords of the Starre-chamber*, the *State* was driuen, to make a ſtatute. By authority whereof their Lordſhips proceed in that and others *ex officio*, albeit (in many cauſes) they haue ſome partie grieued, that by way of complaint promoteth and proſecuteth the office. Yet the proceeding is (as was touched afore) by way of *enquirie*; in that no man (there) ſueth for priuate recompenſe; but the ſcope of the whole proceſſe is *criminall, & ad vindictam publicam, vel corporalem vel pecuniariam, applicandam fiſco, non parti.* So that where men haue iuſt cauſe of griefe, yet was it thought very expedient & requiſite, to prouide a ſharper courſe by way of *enquirie of office*. How much more then is this courſe needfull to be holden, for puniſhing *Eccleſiaſticall crimes*, which (by the policy of this Realme) haue no other puniſhment: and where no man hath (for the moſt part) any priuate iniury, wherupon to complaine himſelfe?

Here perhaps it will be ſaid, that he which can giue informa-

tion

tion of a crime to a iudge; may *accuſe*, or procure a *preſentment* in an *Eccleſiaſticall* Court (if it be of that iuriſdiction) or may *informe* and procure an *enditement*, if the cauſe be Temporall: or els that it were meet his information be not beleeued, but that he ſhould be holden as a ſlanderer and a malicious perſon. We are to remember, that if this *Dilemma (viz.* either thou muſt *accuſe* and proſecute him, &c. or elſe thou art but a ſlanderer) had not *quiddam tertium* to miniſter anſwere vnto it; many grieuous faults ſhould paſſe vnpuniſhed, and many poore men ſhould be ſore pinched. For experience teacheth, that [1] often times *euen in crimes publikly committed, you ſhall hardly finde witneſſes, that will depoſe their direct knowledge, when it tendeth to the offence of ſome man of countenance, that may do them a diſpleaſure after.* And therefore they will either ſay, they ſaw it not, heard it not, marked it not, or at that time remember it not. Yet it is knowen, that a witneſſe is vrged by the religion of an oath, and is not entended to thruſt himſelfe into the matter willingly: which as it ought to ſerue to take away all offence conceiued by him whom he toucheth; ſo ought it to waſh away all feare and other affection, in the witneſſe.

[1] Clarus ibid. q.6.

Then how much more probably may it be ſuppoſed, that there is many a meane man, (though otherwiſe able to giue good and true information, perhaps of three or foure witneſſes, which doe know the matter more fully, and touching other particularities, ſufficient for a *Iudge* to *enquire*, and to looke into the partie ſo *denounced)* who neuertheleſſe in many reſpectes dare not become an open *Accuſer*, or a preferrer of *preſentment*, of *enditement*, or of *information?* becauſe there is more cauſe to take offence at ſuch, then at one, who is called and vrged to teſtifie. So that if there were no meanes for a *Iudge Eccleſiaſticall* to take knowledge, nor to proceed, but vpon the voluntarie proſecution and *accuſation* of ſome *partie*, (which is the courſe oppoſite vnto proceeding *ex officio*) then ſurely many execrable offences that are moſt diſpleaſing to Almightie God, offenſiue to the godly, dangerous to mens inheritances, and to the offenders owne ſoules health; yea and ſome that be pernicious banes to all religion, vnto profeſſing of God, and to Chriſtianitie it ſelfe, were like (through want of diſcouerie and impunitie)

to

to ſpread themſelues ouer both *Church* and Common-wealth in very ſhort time, before *Accuſers* would be found: Namely, *Atheiſme, Apoſtaſie from Chriſtianitie, Hereſie, Idolatrie, Schiſme, Errour in matter of Religion, Sacrilege, Periurie Eccleſiaſticall, Blaſphemie, Subornation of periurie aſwell in matters of mariage and teſtament (being of ſpeciall conſequence) as in others; Horrible ſwearing, Polygamy or many wiues, Inceſt, Adulterie, and other vncleanneſſe, Drunkenneſſe, exceſſiue Vſurie, Simonie, Forgeries of Eccleſiaſticall ſeales for teſtimonie, Vſurpation of the holy Miniſterie, dangerous Conuenticles, vngodly libelling, and ſuch like.*

For who are commonly made priuie to ſuch ſinnes, but men of like humour and affection? in whom we may not preſuppoſe ſuch ſinceritie of conſcience, that for reformation of the partie delinquent, they will abandon all friendſhip, and aduenture any diſpleaſure; euen but to take a triall (with their great charge and trouble) howe they ſhall be able to make proofe of ſuch matters againſt them.

Beſides theſe inconueniences, that otherwiſe would enſue; there be many others, all which (in particularitie) to rehearſe, would be ouer tedious. As after an *accuſation* be begun, & that the *Iudge* ſeeth violent preſumptions againſt the partie conuented: if the proſecutour for feare, for tediouſneſſe, for bribes, or by colluſion would deſiſt: were it not meet that the *Iudge, of office* ſhould neuertheleſſe proceed by *enquirie*; that the delinquent may reape, as he hath deſerued? is it not meet that a *Iudge* ſhould be more carefull of the publike good of the Common-weale, then euery common perſon? and if he be ſo in deede, ſhall he not be allowed as good meanes to doe theſe *good offices* to his *Prince* and *Countrey*, as any priuate perſon? And ſhall he not be as much cheriſhed and allowed vpon his owne care, and for his dueties ſake, to procure the ſuppreſſing of ſinne and reformation of offenders, as to do it, at the inſtigation of any priuate partie? Nay is there not leſſe danger of ſuborning, corrupting, or inſtructing of witneſſes by a *Iudge* (who hath no priuate intereſt to ſee a man puniſhed) then there is in the proſecution by a *partie*; who (for the moſt part) doth it but of malice, or vpon ſome other ſiniſter reſpect? And what if any that is in deed a friend, ſhould be [1] purpoſely framed to be an *Accuſer*;

[1] Ioh. Andr. in add. ad Spec. tit. de inquiſitionib.

to

to the intent ſome delinquent may eſcape, and not be called againe into perill, vpon the ſame *crime*? If it be ſaide hereunto, that the penaltie of *calumniation*, viz. *pœna talionis* which is to be inflicted vpon him that faileth in proofe of his *accuſation*, will take away this ſuſpicion; it may be replied, that in moſt countries, this *pœna talionis* is growen in diſuſe: but chiefely this may be anſwered (euen where that penaltie ſtill hath place) that the *Accuſer* may make halfe a good proofe (as by one vpright witneſſe) and [1] ſo ſhould both the delinquent eſcape puniſhment; and himſelfe alſo (by lawe) be freed from danger of the penaltie of *calumniation* preſumed, and of enduring *retaliatio*.

[1] c. 1. de elect. in 6.

Beſides, the like equitie may alſo often happen, when onely two ſufficient witneſſes can teſtifie of a crime: for if the one of theſe ſhould be driuen (of neceſſitie) to be a *partie*, then the full prooſes (required in ſuch caſes) were thereby cleare taken away; and ſo the offendour ſhould eſcape puniſhment. And therefore there is both neceſſary vſe, and good equitie, to warrant proceeding *ex Officio*, in matters criminall.

CHAP. X.

An anſwere to ſome further obiections made againſt the conueniencie and reaſonableneſſe of proceeding againſt crimes of Office.

TO croſſe the neceſſarie practice of proceeding *by Office*, [1] the *Note-gatherer* aſſigneth ſundry *inconueniences* by him ſurmiſed to ariſe thereof. First, (ſaith he) *In treaſon and felonie chalenge is admitted to the Accuſer: here none. For it is in the Ordinarie to admit one to infourme, and to witneſſe againe in the cauſe, wherein he was before depoſed, to the contrary.* What theſe laſt wordes, viz. *to the contrarie*, doe ſerue for here; neither I, nor perhaps the *Author* himſelfe of the *Notes*, can coniecture. If *Accuſer* here be taken for a witneſſe (as is afore ſhewed:) then I muſt tell him, that challenges and *exceptions* againſt witneſſes not onely be allowed vnto the defendant at the lawe *Ciuill* and *Eccleſiaſticall*; but in a farre more beneficiall manner, then is receiued by vſe at the *Common* lawe of this Realme. For it is commonly ſaid (howe truely I am not to diſcuſſe) that a

[1] In his title of Inconueniences.

witneſſe ought not to be receiued nor depoſed vpon his oathe for the priſoner, as being againſt the *Queene*. And if ſuch be permitted to ſpeake at the priſoners requeſt (as ſome ſeldome times hath bin) and be not ſworne thereunto: what credite will the Iurie giue vnto his bare wordes? nay what credite may they giue to them, and ſaue their owne oathes; who are ſworne to deale according to their *Euidence*; which cānot be ſo termed, except it be vpō oath, vpon matter of record, or vpō the parties cōfeſſion.

But if he take *Accuſer* here, for him that voluntarily proſecuteth and ſoliciteth the *office*; then he may remember, that againſt ſuch, the very *Cōmon* lawe giueth no challenge; becauſe any man may preferre *Enditements* & follow them for the *Queene*: whereas the *Ciuil* law hath whole titles of chalenges that may be made againſt *Accuſers*; which lawes be alſo retained in thoſe Courtes, againſt all *voluntarie* preferrers to *the office*, who are holden as *parties*. But if the *Iudge* alone at the *Common* law cauſe an *Enditement* to be put vp; may the priſoner *challenge* the Iudge, when as he ſhall not challenge any common perſon, which doth it?

That is true in part, which he ſaith, *that in* [1] *enquirie of office, a Iudge* (by the *Ciuill* lawe) *may examine him which denounced the matter, as a witneſſe therein.* Yet it is not generall in euery *denounceour* or preferrer vp vnto *the office*, but onely in ſuch as be *officers* ſpecially appointed, & ſworne for that purpoſe. Now what wāt of equitie, or what iniuſtice is herein, ſeeing perhaps ſuch knoweth the matter beſt, & was the man that infourmed his fellowes of his particular knowledge therein, which made it to be preſēted? May not one ſingle man in a graund Iurie doe the like? And what ſhould hinder ſuch a man afterward to giue alſo particular euidence therof at time of the triall? For is there any courſe more vſuall, then for him that preferres vp the *enditement*, & giues euidence to haue it found; to be alſo a witneſſe, & to giue euidence of the very felonie, &c. at the priſoners triall for life and death?

[1] Bartol. in l. Diuus. ff. de cuſtod. reorum.

But if it were true, that euery *Infourmer* & proſecutour might be examined alſo as a witneſſe (which is very vntrue both by lawe and practice) howe could this proue, that which he aduoucheth; viz. *that no challenge againſt the Accuſer is admitted in Courtes Ciuill and Eccleſiaſticall*, ſeeing both againſt proſecutors and witneſſes by the *Ciuill & Canon* lawes, *exceptions* or challenges

ges may be taken? And though it were true, that this were generally allowed, and were alſo an inconuenience: ſhall therefore the examining of one for another, when he ought not in equitie to be, ouerturne all proceeding *of office* as vnreaſonable, which is the drift at which he aimeth?

Another of his *Inconueniences* hereof is; that *hereby a Biſhop may (vpon his owne ſuſpicion) ſupplie the place of an Informer, a Witneſſe, and a Iudge.* That his *owne ſuſpicion* alone, will not ſerue to open way to ſuch proceeding, is ſhewed afore in the ſeuenth Chapter. And howe the Biſhop being Iudge, ſhould be vſed as a witneſſe in the ſame cauſe, wherein he is a Iudge; there is no colour in al the lawe or practice, that I haue knowen, or can imagine. Except it be in a matter done in his owne preſence, whiles he ſits *iudicially*; and appearing alſo *notoriouſly* vnto others there beſides himſelfe; or eſpied onely by himſelfe.

Now if the preiudice to the partie be not very great, why the Iudge alone, aſwell as any cõmon perſon there, that might happen to haue heard it or ſeene it, may not be truſted for a ſounde witneſſe; I for my part can ſee no cauſe. Hath the *Note-gatherer* neuer heard of a Cut-purſe eſpied by the Iudge himſelfe ſitting on the bench, by him cauſed to be ſtaied, and being *endited* vpon his relation, preſently tried and condemned?

For a third *inconuenience* hereof, hee aſſigneth: that *it is a meanes to drawe cauſes from the Common lawe, when neither in the Citation nor Bill, men ſhall knowe the cauſe, why they be conuented: and ſo are depriued of the meanes of ſuing a Prohibition at the Common lawe.* This he termeth *Addere forum foro.*

Yet *enquirie by office* preſcribeth no ſuch generalitie of *Citation.* And therefore if this were true, it maketh nothing againſt that proceeding. But that a *Libel* doth not conteine the cauſe of the conuenting, is a very ſtrange, and no leſſe bold aſſertion. If his meaning in this obiection be, that a man cannot procure a *Prohibition*, till he haue the copie of the *Libell*; thereby to ſhewe the *temporal* Iudge, that ſomething is there in demaunde or proſecution, that is not of *eccleſiaſticall Coniſance:* then he might more plainely haue declared it. And for mine owne opinion, hereunto I wil agree, that (in moſt caſes) the law is ſo; howſoeuer late practice be otherwiſe.

For when the *ecclesiasticall* Iudge denieth the copie of the Libel where he ought not, to the preiudice of the partie, in this respect: then the statute of *K. Hen.* the 5. and a writ therevpon framed, doth relieue him. And *denying copies of libels*, needed not to haue bin cõplained of at that time as a grieuãce, if the law had bin, that vpon the parties owne suggestion only, without sight of the Libell, the *temporal* Court might at pleasure award a *Prohibition*. So that this not expressing of cause in the *Citation*, and denying *copie of the Libel*, is so farre from being a meanes to drawe causes from the *Common* law vnto those Courts; that it is of it selfe sufficient to bring thither by *Prohibition* causes originally being of *ecclesiasticall Conisance*.

2. Hen. 5. ca. 3. Register. pag. 58.

But what serueth this *not expressing of the cause of comenting*, (if it were so) for condẽnation of all proceeding *by Office*; seeing this might no lesse happen to be omitted, though the *prosecution* were at the instance of a *partie* or *Accuser*? Yet further to satisfie both him and others herein; *Citations* in causes *Criminall* out of *ordinarie* Courtes, Letters missiue, and Attachements out of *Commission* Courtes, doe all import, that there be misdemeanors of *ecclesiasticall* Conisance, to be obiected against the partie conuented. Albeit to expresse al the particulars, would be both ouer tedious and chargeable to the subiect, and (in many respectes) inconuenient besides. And why should this be accounted any more inconuenient or vnreasonable, then writtes of *sub pœna* out of the *Starre-Chamber* or *Chauncerie* are, which conteine not so much particularitie of the matters obiected, as those *Citations* in *ecclesiasticall* Courtes?

In the reigne of *K. Hen.* the 8. there were contrary writings published betwixt *S. German* a common lawyer, and *Sir Thomas More*, about proceeding onely against *heresie ex officio mero*; and without any of those allowed meanes precedent, which (by law) may open a way to such *Enquirie*. These reasons of *Sir Thomas Mores*, the *Note-gatherer* assaieth summarily to answere; and I minde not to defende; further then I finde them coincident with some by me vsed, and not fully answered by him. And the rather, because hauing not *Sir Th. Mores* bookes in readines with me, I cãnot know how truely they be gathered: & for that proceeding *of office* against other crimes, & vpon allowed groũdes by lawe, may

may ſtand ſound and good; though all that which *Sir Thomas More* defendeth in dealing againſt *hereſie* (without *Preſentment, fame, &c:* eſpecially where the penaltie is ſo grieuous) were to be condemned for vniuſt and vnequall.

Sir Thomas More in iuſtification of ſuch proceeding againſt *hereſie*, alledgeth the like courſe to be holden, in miniſtring of temporall Iuſtice, viz. *that Iudges vpon ſecret information, binde a man to his good abearing, and awarde out a Writ to enquire* De geſtu & fama, *againſt any man whome they pleaſe: and that the Lorde Chaunceller vpon like ſecret information, putteth men out of Commiſſion.* For anſwere of theſe, the *Note-gatherer* ſaith thus: *But they doe not without matter prooued, put a man from his free-holde, or in danger of life, loſſe of goods, &c: as Miniſters be deprined, and put from their freeholde.* By which his anſwere appeareth, that he yeeldeth theſe obiections (in facte) to be true: and the conſequence cannot be denied For if the ſame courſe be iuſt and reaſonable in them; why ſhould it be vnreaſonable in others? As for the grieuouſneſſe of the penaltie ſurmiſed to be in the one greater then in ỹ other; this is not material to make it of iuſt, vniuſt. For *Magis & minus non variant ſpeciem:* more or leſſe makes not things to be of diuers kindes. And what will he ſay then, againſt that Criminall proceeding *of Office*, where neither life, free-holde, nor goods is called into queſtion? Shall that then (in his iudgement) be reaſonable and iuſt? Furthermore, what doth this particular recrimination hinder the conueniencie of proceeding *by office?* For doth that courſe of proceeding teach or require, that men be puniſhed *without any matter proued?* Therefore if this ſhould happen ſo to be; yet is it onely the perſonall fault of the men, and not of Law, which eſtabliſheth proceeding *ex Officio.* For though an *Accuſer* ſhould proſecute; yet the Iudges (if they were ſo vngodly minded) might *(de facto)* offer this vniuſtice. Yet this ought not to be any cauſe to condemne all proceeding by *Accuſation*, to be vnreaſonable or vnequall.

But this is ſo farre from any tolerable anſwere vnto thoſe obiections; that it is (in trueth) nothing elſe, then a very vntrue and ſlanderous imputation, that will not, nay cannot be iuſtified. What? *Miniſters deprined, yea put in danger of loſſe of life, or goods, without any matter proued?* I cannot cõiecture what further mea-

ning herein he may haue, otherwiſe then to ſlander: except perhaps he thinke, the *Notorious* wilfull *contumacie* of thoſe that refuſed ſundry times vpon their oathes to anſwere Articles obiected on her *Maieſties* behalfe (for matters of their owne facts, or within their knowledges, and not touching either their liues or limmes) ſo farre as by Lawe they were bound; not to be *a matter ſufficiently appearing and proued* to the Iudges: whereas ſuch their *contumacie* and contempt, euidently appeared to the honourable perſons, Iudges, and other ſage, prudent, and learned men, not onely to be moſt vntolerable; but was iudged by them, to tende alſo vnto the vtter ouerthrow of the whole fundamentall iuſtice of this Realme, if it ſhould be ſuffered.

[1] Inter epiſt. Caluini in folio pag. 421. & 422.

I do read in deed,[1] that the Miniſters of *Geneua* do in a letter of their owne, written to the Miniſters of *Berne* (againſt one *Cumperell* a Miniſter alſo of *Geneua*) teſtifie no leſſe of the *Elderſhip* there, then here is traduced. For becauſe *Cumperell*[2] did not anſwere directly (as they thought) before the *Conſiſtory* or *Elderſhip* vnto their Interrogatories by them of *meere Office* miniſtred vnto him (whereof two concerned his thoughts, and the very cogitations of his heart) ſo that they helde him thereupon as conuicted: and for that there were *vehementia indicia, great preſumptions, with a common fame*, that he being ordeined Miniſter for a pariſh in their territorie, called *Drallian*, had neuertheleſſe vnder hand ſought to place himſelfe in the territorie of *Berne* (for this was his heinous fault whereof they then enquired:) Therefore the *Conſiſtorie* pronounced, *Quòd erant iuſtæ cauſæ, cur Miniſterio abdicaretur*; that they were iuſt cauſes to depoſe him from his Miniſterie. So that albeit we haue no ſuch Lawe or practiſe in *England* (thanks be to God, whatſoeuer the *Note-gatherer* ſaith) to condemne a man, *without any matter proued:* yet ſome other Churches (whom he & his *Conſorts* doe more admire, then their owne) thinke they haue warrant ynough, euen vpon *a fame* and ſome tokens, to depoſe a miniſter, when they ſhal find that courſe meete to be vſed.

[2] Two meanes to occaſion Enquirie and examination *of Office*, euen at *Geneua*.

Another reaſon in that behalfe is alledged by *Sir Th. More*; that the *Lords* of the *Counſel* vpon ſecret information call men *of Office*, without any proſecutor, vnto examination of matters *criminall*. To which the *Notegatherer* anſwereth thus: viz. that *this*

is, in

is, in matters concerning the ſtate of the Prince and of the Realme; in matters of allegeance: and that a Ieſuite or Seminarie prieſt may be examined by othe, quia ipſo facto *a traitour*.

Firſt, all the matters that their *Lordſhips* doe, or may examine, are not of ſuch hie qualitie. And if they were, it is not the importance or heinouſnes of the matter, that can make *Iuſtice* of that, which is *Iniuſtice* in it ſelfe; as was touched by me afore. And ſo be alſo ſundry matters dealt with, in ſome Courts *Eccleſiaſticall* neerely touching the ſtate of the *Prince* and *Realme*. Beſides, it is a very ſtrange allegation to ſay, The *Ieſuits or Seminarie Prieſts may be examined by othe*, quia ipſo facto *traitours*. As if all, or any traitours, might be examined by othe of their treaſons; conſidering, that to examine the *partie* by othe, of matters touching loſſe of his life, or limmes, is flat contrary to the Lawes, policie, and cuſtome of this *Realme* in both ſorts of Courts: yea and perhaps contrarie to diuinitie too, as the *Treatiſoure* his owne *Camerade* (though fighting in the ſelfe ſame quarrell and following the ſame Coloures) can and doth tell him.

That which hath bene ſaid to theſe two laſt obiections, may alſo ſerue *to retoyne* vnto his *replie*, made againſt the obiection, that the like courſe is vſed by *Martiall* Lawe.

But if this proceeding *of office* by *Speciall enquirie* be ſo reaſonable and oftentimes neceſſarie; how commeth it to paſſe (may ſome man aske) that the names of *Inquiſition* and *Inquiſitours* be holden ſo odious? Admit thoſe names be odious vnto many: yet this (without further reaſon) may not ſerue to cõdemne ẏ courſe it ſelfe. For many ſorts of men be alſo odious, perhaps without any iuſt deſert or particular abuſe in themſelues, other then for their office ſake, who are not therefore wholly to be reiected: as, *Informers of concealments of pœnal ſtatutes, Takers, Purueyers, Bailifes errand*: yea and ſome *adminiſters of Iuſtice too*, if they be any thing exact & ſeuere therein. Neither is this odiouſnes generall againſt all *Inquiſition* whatſoeuer; but only againſt one particular courſe of proceeding thereby in the crime of *hereſie* practiſed in ſome *Popiſh* dominions: but of al other moſt rigorouſly and cruelly in *Spaine*; yea (as is ſuppoſed) farre beyond their owne *Commiſſion*, that they haue from the *Pope*: and yet their *Commiſſion* is alſo in many points exorbitant from all Lawe and reaſon.

A writer

ning herein he may haue, otherwiſe then to ſlander: except perhaps he thinke, the *Notorious* wilfull *contumacie* of thoſe that refuſed ſundry times vpon their oathes to anſwere Articles obiected on her *Maieſties* behalfe (for matters of their owne facts, or within their knowledges, and not touching either their liues or limmes) ſo farre as by Lawe they were bound; not to be *a matter ſufficiently appearing and proued* to the Iudges: whereas ſuch their *contumacie* and contempt, euidently appeared to the honourable perſons, Iudges, and other ſage, prudent, and learned men, not onely to be moſt vntolerable; but was iudged by them, to tende alſo vnto the vtter ouerthrow of the whole fundamentall iuſtice of this Realme, if it ſhould be ſuffered.

I do read in deed,[1] that the Miniſters of *Geneua* do in a letter of their owne, written to the Miniſters of *Berne* (againſt one *Cumperell* a Miniſter alſo of *Geneua*) teſtifie no leſſe of the *Elderſhip* there, then here is traduced. For becauſe *Cumperell*[2] did not anſwere directly (as they thought) before the *Conſiſtory* or *Elderſhip* vnto their Interrogatories by them of *meere Office* miniſtred vnto him (whereof two concerned his thoughts, and the very cogitations of his heart) ſo that they helde him thereupon as conuicted: and for that there were *vehementia indicia, great preſumptions, with a common fame*, that he being ordeined Miniſter for a pariſh in their territorie, called *Drallian*, had neuertheleſſe vnder hand ſought to place himſelfe in the territorie of *Berne* (for this was his heinous fault whereof they then enquired:) Therefore the *Conſiſtorie* pronounced, *Quòd erant iuſtæ cauſæ, cur Miniſterio abdicaretur*; that they were iuſt cauſes to depoſe him from his Miniſterie. So that albeit we haue no ſuch Lawe or practiſe in *England* (thanks be to God, whatſoeuer the *Note-gatherer* ſaith) to condemne a man, *without any matter proued:* yet ſome other Churches (whom he & his *Conſorts* doe more admire, then their owne) thinke they haue warrant ynough, euen vpon *a fame* and ſome tokens, to depoſe a miniſter, when they ſhal find that courſe meete to be vſed.

Another reaſon in that behalfe is alledged by *Sir Th. More*; that the *Lords* of the *Counſel* vpon ſecret information call men *of Office*, without any proſecutor, vnto examination of matters *criminall*. To which the *Notegatherer* anſwereth thus: viz. that *this is, in*

[1] Inter epiſt. Caluini in folio pag. 421. & 422.

[2] Two meanes to occaſion Enquirie and examination *of Office*, euen at *Geneua*.

is, in matters concerning the ſtate of the Prince and of the Realme; in matters of allegeance: and that a Ieſuite or Seminarie prieſt may be examined by othe, quia ipſo facto *a traitour.*

Firſt, all the matters that their *Lordſhips* doe, or may examine, are not of ſuch hie qualitie. And if they were, it is not the importance or heinouſnes of the matter, that can make *Iuſtice* of that, which is *Iniuſtice* in it ſelfe; as was touched by me afore. And ſo be alſo ſundry matters dealt with, in ſome Courts *Eccleſiaſticall* neerely touching the ſtate of the *Prince* and *Realme.* Beſides, it is a very ſtrange allegation to ſay, The *Ieſuits or Seminarie Prieſts may be examined by othe,* quia ipſo facto *traitours.* As if all, or any traitours, might be examined by othe of their treaſons; conſidering, that to examine the *partie* by othe, of matters touching loſſe of his life, or limmes, is flat contrary to the Lawes, policie, and cuſtome of this *Realme* in both ſorts of Courts: yea and perhaps contrarie to diuinitie too, as the *Treatiſoure* his owne *Camerade* (though fighting in the ſelfe ſame quarrell and following the ſame Coloures) can and doth tell him.

That which hath bene ſaid to theſe two laſt obiections, may alſo ſerue *to reioyne* vnto his *replie,* made againſt the obiection, that the like courſe is vſed by *Martiall* Lawe.

But if this proceeding *of office* by *Speciall enquirie* be ſo reaſonable and oftentimes neceſſarie; how commeth it to paſſe (may ſome man aske) that the names of *Inquiſition* and *Inquiſitours* be holden ſo odious? Admit thoſe names be odious vnto many: yet this (without further reaſon) may not ſerue to cõdemne ẏ courſe it ſelfe. For many ſorts of men be alſo odious, perhaps without any iuſt deſert or particular abuſe in themſelues, other then for their office ſake, who are not therefore wholly to be reiected: as, *Informers of concealments of pœnal ſtatutes, Takers, Purueyers, Bailifes errand:* yea and ſome *adminiſters of Iuſtice too,* if they be any thing exact & ſeuere therein. Neither is this odiouſnes generall againſt all *Inquiſition* whatſoeuer; but only againſt one particular courſe of proceeding thereby in the crime of *hereſie* practiſed in ſome *Popiſh* dominions: but of al other moſt rigorouſly and cruelly in *Spaine*; yea (as is ſuppoſed) farre beyond their owne *Commiſſion,* that they haue from the *Pope:* and yet their *Commiſſion* is alſo in many points exorbitant from all Lawe and reaſon.

A writer

A writer in the *Ciuil* Law aſſigneth a ſpeciall cauſe of the hatefulnes vnto the Cómon people of the *Spaniſh Inquiſition* for matters of *hereſie*. [1] *Inquiſitors of hereſie* (ſaith he) *are hatefull and ſuſpected of all Lay-men, becauſe of a long time it hath bene beleeued, that they are wont to proceede vpon moſt light ſuſpicions, eſpecially againſt thoſe that be riche.* Nay in deede how can it be otherwiſe, ſeeing their dealing by that *Inquiſition* is eſpecially againſt men of greateſt wealth; becauſe vpon their condemnation their goods and lands are confiſcated to the houſe of *Inquiſition*: that is, to the *Inquiſitours* themſelues?

1 Albericus de Roſate. in rub. C. de hæret. nu. 6.

Now ſeeing none of theſe ſtrange courſes be vſed in any *Criminall* proceeding in this Realme; there is therefore no iuſt cauſe here, to make it hateful vnto any. Yet the *Treatiſer* doth imagine this kind of proceeding to be more frequent in Courts *eccleſiaſticall* within this Realme in reſpect of the Iudges owne fees, thereby ariſing. For anſwere whereof: Firſt in Courts of *Commiſſion Eccleſiaſticall* (againſt which ſome haue the greateſt edge and egerneſſe) the *Commiſſioners* haue no fees at all; no not ſo much as iiij. s. towards their charges, that *Iuſtices of Peace* be allowed by Statute, at ſuch times as they ſerue at *Seſſions of the Peace, &c:* whereas *Commiſſioners* are employed, and ſerue therein freely at their owne charges, with loſſe of time and intermitting their owne buſineſſe, only of dutie and conſcience to her *Maieſtie* and to the Common weale. So that if it were not in this reſpect, the *Commiſſioners eccleſiaſticall* both might and would ſit ſtill, with more eaſe to themſelues, and leſſe obloquie; howbeit by the worſt of euery ſort of Subiects.

As for Courts of *Ordinaries*, I knowe ſome of the greateſt of them in *England*, that haue not two matters *ex Officio mero* proſecuted in them, in three yeeres ſpace. And for ſuch *ordinarie* Courts as haue ſome moe cauſes of that nature: alas, what great fee is it, for the *Iudge eccleſiaſticall* to haue iij. pence for a *Citation*, or vj. pence for examination of a witneſſe, or vpon an acte of *Abſolution*, or ſuch like; to make him deſirous (in that reſpect) to entertaine the cauſe; ſeeing hee will hardly be excuſed with xx. pound charges (that euery ſuch ſeuerall matter may put him vnto) if an *Appellation* be brought vpon any errour or miſtaking, that may happen to be found, in his proceedings *of Office?*

Beſides

Beſides that, the like fees are due to the *Iudge*, no leſſe vpon the proſecution of a *partie*, then they be vpon proceeding *by office*: and therefore none inconuenience heereupon more in the one courſe (which this opinion alloweth) then there is in the other.

Yea, may ſome ſay, all prooue not offenders, that be ſo called, and that are thereby put vnto trouble and charges. It is true; yet meet to be called, if the law be obſerued in this point, that there muſt be (afore) a ſufficient ground of inducement thereto. Neither doe all thoſe prooue to be offenders, that are proſecuted by a *partie* or by an *Accuſer*; and thereby be put to no leſſe charges and trouble, euen when (beſides the malice of the preferrer) there was no colourable ground of the *accuſation*. The like may be alſo truely ſaid of many others, who be called euen before *temporall Iudges* and *Iuſtices of the peace*, either by warrant, writte, or otherwiſe. Yet is this no cauſe, heereupon wholly to diſallow theſe conuentings. And there is no more reaſon to finde fault with the fees due vnto the Iudges eccleſiaſticall, in regard that euery one which happeneth to be conuented, prooueth not guiltie of the matter imputed to him: then there ought to be with the fees, that are due to Iudges in temporall Courts for *iudiciall* or *originall* writtes &c. becauſe many of ſuch ſuites be commenced (as often falleth out in the end) without good matter on the Plaintifs or Informers behalfe. Thus much in anſwere to the obiections made againſt the reaſonableneſſe, and conueniencie of proceeding *by Office*.

CHAP. XI.

That the lawes of the Realme do vſe Enquiries *and proceedings* ex officio, *and that they allow it in Courts Eccleſiaſticall, with anſwere to ſome obiections that are made to the contrary.*

IN the next place I am to ſhew, that dealing by way of enquirie or enqueſt, *ex officio*, without ſuite of a *partie*; called by the Common law *Office del Court*, are both mentioned and practiſed by the lawes of the Realme. In [1] *Magna Charta* mention is made *of a writ of Inquiſition of life and member*. In an olde ſtatute of *king Edward* the firſt, a [1] Mag. Charta. cap. 26.

ſeuerance is made betwixt the ſuite of the *King* from the ſuite of a *partie*: and the *King* is thereby (as it were) bound to ſue, and to lend *his office*, for proſecution of the miſdemeanours. For it is

1 3.Ed.1.cap.13. [1] thus prouided, that *if any take away a woman by force &c. the King at his ſuite that will ſue, ſhall doe common right within fortie dayes: and if none commence his ſuite within fortie dayes, the King ſhall ſue.* Which ſuite being in his owne Court, and before himſelfe, muſt needs be *of office*. For where there is *Inquiſitio, Enquirie*, there the *King* is partie: as by another ſtatute of the ſame

2 Stat.de Inquiſ. capiend.33.Ed.1. [2] *Kings* dayes appeareth: *De Inquiſitionibus coram Iuſticiarijs quibuſcunque capiendis, & in quibus D. Rex eſt pars qualitercunq; concordatum eſt &c.* In a ſtatute of [3] *king Edward* the third, arreignment *at the ſuite of the King* (which is *ex officio*) as a diſtinct matter from that which is *at the ſuite of a partie*, is ſpoken of: and ſo

3 18.Edw.3.pro Clero,c.2.

4 42.Ed.3.c.4. [4] are alſo *Commiſſions of inquiſition* afterward. Furthermore in K.

5 8.H.6.c.16. [5] *Henrie* the ſixt his time, enqueſt or *inquiſition of office* is mentioned: and in ſundrie [6] ſtatutes both after and afore, which are

6 11.H.7.c.25. & 1.H.8.c.12. needleſſe to be repeated. For (as I take the matter) euery enditement is an Inquiſition: which if it be at the proſecution of a partie, it is, as *officium promotum*: but if it be by the Iudges, for the *Queene* (in reſpect of the intereſt of the Common-wealth) then is it *officium merum* or *nobile*, as afore is declared.

This maner of dealing, in ſundrie caſes is ſo vſuall at the *Common* law; that there be whole titles made in the Abridgements, touching *Inquiſition* and *office del Court*: *viz.* of enquiries and matters done by the Iudges vpon their diſcretions, without the *inſtance* of any *partie*.

7 M.10,H.6.38. In reports at the Common law, we finde it ſaid, [7] that *Iudges ex officio did charge an enqueſt to make enquirie of their owne colluſion, ſuppoſed to be committed among them.* [8] Further: *One of a Iurie, that departed from his fellowes after that he was ſworne, was examined at his returne by the Iudges* ex officio, *whether he had ſince ſpoken with the defendant or no?* Likewiſe it is ſaid, [9] *that the Court* ex officio *ought to award an Aſſiſe to enquire (whether the diſſeiſin were with force) by reaſon of the kings fine.* In the booke of [10] Aſſiſes: *The Court* ex officio *ſent a man to priſon, becauſe they found he had not made fine.* And a great number of particular articles are there ſet down, *whereupon* [11] *enqueſt or inquiſition* ex officio *in the Kings bench*

8 34.Edw.3.3.

9 11.H.4.17.

10 Aſſiſ.lib.16. pag.4.

11 Aſſiſ.lib.27. [a].138.

is

is to be made. We finde of elder time by [1] *Bracton, where the appellor that proſecuteth, makes default or dieth, there the king may proceed* ex officio. And againe there: *Let the king* ex officio ſuo, *& for his peace proceed to inquiſitiõ, for the ſuſpicion that he hath of the appeale.* [1] Bracton. li.4.c. 8.fol.302.

Moreouer, where a Parſon and Vicar were both willing enough to ſue before the Temporall Iudges: yet [2] *the Iudges finding the plea to be of Eccleſiaſticall iuriſdiction, did* ex officio, *at no mans inſtance, diſmiſſe it out of that court, as not perteining to their iuriſdiction.* And do we not often ſee the ordinarie courſe for *enditements*, much aſſiſted and holpen by the Iudges and Iuſtices ſearch, examinations and dealing therein, (*of office* and duetie onely) both in treaſons & felonies, and in other cauſes of more priuate intereſt, that be preferred by others? doe they not alſo vpon their owne diſcretion, & for cauſes knowen to themſelues, without proſecution of any partie, (and ſo *ex officio* onely) often times commit perſons of ſuſpected behauiour to priſon; and not diſmiſſe them, till by a writ of *enquirie de bono geſtu & fama*, they be found worthie to be ſet at libertie? So that by theſe few, and ſundry other that might be brought, it may appeare; that proceeding and *enquirie ex officio*, is ſo farre from being, ſo much as a diuers courſe from the lawes of the Realme, that it is often practiſed thereby, when no partie beſides the *Iudges* themſelues, do entermeddle. [2] M.22,Ed.4.33.

But it is not onely by that law practiſed, but alſo allowed (by it) for a lawfull courſe of proceeding in *Eccleſiaſticall* Courts againſt crimes and offences. By a ſtatute of [3] *Henrie* the fift, *ſuch an Inquiſition of Hoſpitals of the Kings foundation, is appointed vnto Ordinaries: and in thoſe that be of any other mans foundation, Ordinaries are authoriſed not onely to enquire of the foundation, eſtate, and gouernance of them, and of all other matters neceſſarie in that behalfe, but alſo to make thereof correction & reformation, after the lawes of holy Church, as to them belongeth.* So that if *Eccleſiaſticall lawes* doe warrant this enquirie and courſe of reformation and correction, then this ſtatute will giue force vnto it. By [4] another ſtatute: *If any Clerkes be conuicted of incontinent liuing in their bodies (being* but afore perhaps *openly noiſed thereof)* before whom conuicted? *afore Ordinaries.* How? *by examination, & other lawfull proofe requiſite by the law of the Church, they may by the* [3] 2.H.5.cap.1. [4] 1.H.7.cap.4.

Ordinarie, at his diſcretion, be committed to ward. Which together with the *committing*, muſt needs be both done *ex officio:* for that no *partie* to proſecute is there mentioned to be required; and becauſe the *Ordinarie* thereby may proceed, vpon the publike infamie *noiſed abroad.*

[1] 23.H.8.ca.9. The ſtatute of [1] *Citations* made afterward, mentioneth a caſe where an inferior *Ordinarie* may be *partie to a ſuite* holden afore him: which may aſwell be vnderſtood in a cauſe mooued *of Office* for an offence, as in any other matter. But more plainely afterward: for there the very word *ex Officio* is vſed; and it is prouided, that the forfeiture of that ſtatute, *for calling a man out of the iuriſdiction where he dwelleth, ſhall runne againſt him that cited, whether he proceed by vertue* of his office, *or at the ſuite of any perſon.* Whereof may be gathered, that the lawes of the Realme take knowledge of that courſe *ex officio* to be as warrantable as the other, made at the ſuite of a partie: ſo that other requiſites be obſerued. And though the ſtatute againſt *Hereſie* ſtand [2] now repealed, yet it may ſerue to prooue, that not onely *inquirie*, but *examination* alſo of the partie himſelfe, in *a viſitation by Ordinaries* (both which are done *ex officio*) is holden for a courſe of the law *eccleſiaſticall* not to be condemned or diſallowed by the lawes of the Realme.

[2] 27.H.8.ca.10

[3] 1.Ed.6.cap.2. In a ſtatute touching [3] *Ordinaries* ſeales now alſo repealed, certeine *eccleſiaſticall* cauſes be rehearſed: among which, *cauſes* of inſtance *betwixt partie and partie*, are plainly ſeuered & diſtinguiſhed *from cauſes of correction:* thereby giuing vs to vnderſtand alſo, how rarely cauſes of *correction* be proſecuted by any *partie*; but by the *Iudge eccleſiaſticall* himſelfe alone proceeding *of Office.* And [4] by a ſtatute in the firſt yeere of her *Maieſties* reigne, made *for vniformitie of Common prayer, Ordinaries* are authoriſed to *inquire and to puniſh &c.* the violation of that act, *as heretofore hath bene vſed in like caſes, by the Queenes eccleſiaſticall lawes.* But that an *enquiry* is alwayes *of office*, and what the lawes *eccleſiaſticall* be in this behalfe, and how the continuall vſe hath bene, is ſhewed afore: ſo that none need remaine doubtfull in theſe points.

[4] 1.Eliz.cap.2.

The very Common law not onely taketh knowledge of this courſe holden in Courts eccleſiaſticall: but in ſome reſpect doth alſo

also *priuiledge* it, euen aboue the proceeding by a partie. [1] For *if an Ordinarie doe sequester goods of the dead for any contumacie, or ex Officio; which giueth no possession to him, the court spirituall (in this case) shall haue Iurisdiction.* And it seemeth by that case, the lawe to be otherwise, when it is at the suite of a *Partie*. So in a case[2] of violent hands laied vpon a Clerke, *both Brian and Litleton held (no man gainesaying of it) that the spirituall court may punish it* ex officio, *but not at the suite of the partie: least the beater thereby bee kept from his absolution, till some temporall duetie bee contented and paied*. And *Mordant*[3] was of opinion; that *if a man bee sued by a partie* pro læsione fidei *in not paying a summe of money promised, there shall lie a Prohibition: yet if the iudge ecclesiasticall shall doe it* ex officio, *that then no Prohibition shall lie.* Neither doeth any gainesay him herein. Vnto which opinion of his, another iudgement giuen in the[4] booke of *Assises* in like case, seemeth to accord. To like effect also[5] *Fitzherbert* reporteth, that *an Ordinarie may cite and proceed against a man* ex Officio, *pro violenta manuum iniectione in Clericum:* likewise *for tithes detained in the time of vacation of a benefice:* so he may cite also such as *refuse to maintaine a Curate or Chaplaine: and for fornication or like offences.*

[1] 7.H.4.18.

[2] 20.E.4.10.

[3] T.12.H.7. fol.22.

[4] Assis.lib.22. pag.70.

[5] Fitzh.nou. nat.breu.tit. Confultation, fol. 50.&c.

Fitzherbert[6] in another place also thus writeth: *If a man* (saieth he) *be sued in court Christian, or if the bishop sue and cite him* ex Officio *and excommunicate him, &c.* And againe[7] thus: *Significauit lieth not, but where the partie is excommunicate by name,* maiori excõmunicatione: *vpon a speciall suite against him* ex Officio, *or by a partie*: therefore both are alike lawfull, and allowable by the common lawe. And *that for wrongfull detaining of tithes in time of vacation of a benefice, the ecclesiasticall Iudge may cite and proceed ex Officio*, doeth plainly appeare euen by[8] one of those books which the *Note gatherer* doth alleage against this course; though (in trueth) it haue no one word tending that way. Belike he thought no man had the booke but himselfe; because (it may be) he casuallie happened vpon it in rifeling amongst other olde bookes cast aside in some Stationers shoppe. To like effect the same booke hath; that[9] *if a man bequeath a bullocke to a church for reparation of it, or of the churchyard: if he that hath him will not deliuer him, either the Church-wardens may sue for such detinue in a*

[6] Nou.nat.br. pag.64.E.

[7] Ibid.litera F.

[8] Liberties of the Clergie, out of the lawes of the realme, by John Gooddall. Printed by Rob. Wier.

[9] Ibid.

court eccleſiaſticall, or the Ordinarie may ex Officio *call him, and vrge him to deliuerie.* And the like is there teſtified (being taken out of the Regiſter) in a more grieuous crime of eccleſiaſticall cognitance. *For* (ſaieth he) [1] *if the Iudge eccleſiaſticall cite a man of office for fornication, &c. & a prohibition or appeale being brought, he after renounceth all delayes, and ſubmitteth himſelfe: the Iudge ſhall proceed* ad pœnam Canonicam imponendam, *vpon a conſultation or writ vnto him to be directed.*

[1] Ibid. ex Regiſt. in br. orig. pag. 45. a.

Likewiſe the *Regiſter* is very plentifull in this behalfe; as firſt where [2] *Enquirie* (which is alwayes *ex officio*) is not onely allowed, but commanded to be made by a *Iudge* eccleſiaſticall: [3] *Vobis mandamus, quòd habita ſuper præmiſſis per Inquiſitionem & alios modos informatione pleniori, &c.* and for the very word of proceeding *ex officio:* as where it was written vnto the *Officiall* of the court of *Canterbury* or his *Commiſſarie* thus: [4] *Cum vos nuper ex Officio veſtro, fama publica referente, quod* T. *&c. veſtræ iuriſdictionis* C. *in amplexibus fornicarijs tenet, ipſam coram vobis in curia chriſtianitatis pro correctione animæ ſuæ in hac parte citari feceritis, procedentes contra eum (ibidem) iuxta Canonicas ſanctiones, &c. vobis ſignificamus, quòd in cauſis prædictis, ex officio veſtro, quatenus ad correctionem animæ, &c. procedere & facere poteritis, quod ad officium veſtrum ſpeciale de iure noueritis pertinere, &c.*

[2] Berous in rubr. de accuſationibus, nu. 10.
[3] Regiſter, pag. 54. b.
[4] Regiſter. pag. 57. b.

Likewiſe in another *Conſultation* it is conteined thus: viz. *Cum vos* [5] *nuper (vt accepimus) iuxta officij veſtri debitum obieceritis Ioanni de* E. *parochiano de* C. *quòd ipſe, &c. detinet, &c. vobis ſignificamus quòd in cauſa prædicta quatenus ad reſtitutionem, &c. & ad pœnam canonicam eidem* I. *pro detentione eorundem legatorum imponendam coram vobis agitur licitè procedere &c. poteritis.* And againe thus: *Cum per* [6] *vos contra* H. *de Lyndeſey Notariũ publicum ſuper* [7] *fornicationis crimine infra iuriſdictionem veſtram commiſſo grauiter infamatum, tum ſuper dicto crimine, quam ſuper eo quòd iuriſdictionem veſtram per tumultum & rixas, executioneſque veſtras in hac parte debitè faciendas nequiter impediuit, ex officio ad animæ ſuæ correctionem fuiſſet proceſſum, &c. vobis ſignificamus, &c. quòd procedere poteritis.* Mention is alſo there made in a precedent of a *Conſultation*, of proceeding [8] *ex officio ad promotionem parochianorũ*, in theſe words: *Cum ex officio ad promotionẽ dictorum parochianorum*

[5] Regiſter. pag. 57. a.
[6] Regiſter. pag. 54. b.
[7] Vide 3. part. c.
[8] Regiſter. pag. 51. b.

norum, traxeritis in placitum, &c. vobis ſignificamus, quòd procedere poteritis, &c. Furthermore, there is mention made of one, who by that courſe was proceeded lawfullie with, for refuſing to pay his vſuall oblations, to be confeſſed to the Prieſt, and to receiue the Communion, in theſe wordes: [1] *cum ipſum ex Officio veſtro coram vobis ex cauſis præmiſſis euocari feceritis, ad procedendum contra eum, ad pœnam corporalem ſibi pro correctione animæ ſuæ in hac parte infligendam, &c. vobis ſignificamus, quòd in dicto placito, ſic coram vobis ex Officio veſtro, moto; procedere & vlterius facere poteritis in curia Chriſtianitatis, quod ad vos, & ad forum eccleſiaſticum noueritis pertinere, prohibitione noſtra non obſtante.* And vpon a prohibition brought by a knight to his *Ordinarie*, that proceeded *ex Officio* agaynſt him, for certaine *his crimes and exceſſes*; a *Conſultation* was [2] granted: the wordes of the *Regiſter* are theſe: *Cum vos nuper ad corrigendum crimina & exceſſus ſubditorum veſtrorum iuxta Officij veſtri debitum procedentes, R. de C. militi obieceritis, &c.*

[1] Regiſter. pag. 50. b.

[2] Regiſter. pag. 44. b.

The like conſultation is there founde agaynſt a *Chaplaine* proceeded with *ex Officio* for fornication; that had alſo brought a prohibition. The wordes [3] of the Writ vnto the *Ordinarie* be theſe, videlicet, *Cum vos T. de W. capellano, ex Officij veſtri debito obieceritis, quòd ipſe carnaliter cognouit, &c. in animæ ſuæ periculum & ſcandalum aliorum, vnde contra eundem ad correctionem animæ, &c.* As in other conſultations there, after prohibitions (vpon vntrue ſuggeſtions) had bene purchaſed.

[3] Reg. pag. 45. a.

An example is alſo [4] there of allowing (by *Conſultation*) of proceeding *ex Officio*; to the ende of enioyning corporall puniſhment; agaynſt one that *laied violent hands vpon a Clerke*; whereby hee incurreth (ſaieth the Writ) excommunication *ipſo facto.*

[4] Reg. pag. 51. a.

Likewiſe an [5] *Ordinaries* proceeding *ex Officio*, to the interdicting of a Church, and to the inflicting of other *Canonicall* paines for with-holding and not finding of a Chaplaine or Curate to ſerue, (according to an *ordination or reall compoſition* thereof made) is there approoued lawfull by *Conſultation* granted. And ſo is the like proceeding *of Office* allowed for [6] tithes with-holden, falling due to the *Biſhop* and *Archdeacon* in the time of vacation of the benefice; for by the lawe and cuſtome then,

[5] Reg. pag. 51. b. & 52. a.

[6] Reg. pag. 51. a.

[1] Changed by the ſtatute, 28. H. 8.

then, in [1] moſt *Diœceſſes* of this realme, tithes of vacant benefices were due to them.

In the writ of *Conſultation* alleaged afore out of the 57. page of the *Regiſter* for allowing proceeding *ex Officio* againſt a fornicator: it is [2] alſo conteined; that the partie before prohibition by him brought, had ſubmitted himſelfe: for which cauſe of the parties violating his owne ſubmiſſion, and for his contempt *mandatorum ſibi factorum*: the *Ordinarie* is authorized and warranted to deale againſt him, (as afore he had begun) *ex officio*. By all which may appeare, both the practiſe of *Inquiſition*, and proceeding *ex officio* in ſome caſes by the lawes of the Realme, and the allowance alſo by thoſe lawes, of ſuch courſe holden in *courtes eccleſiaſticall* both in offences and in other cauſes alſo, that be neither *teſtamentarie* nor *matrimoniall*.

[2] Reg. pag. 57. B.

But it may perhaps be ſayd, that great abuſe may hereupon folow, if the *Iudge* liſt to vexe a man wrongfully: for he may pretend ſtrong *Euidence* and *Information* or a *common fame* to be againſt a man, or ſuch like afore ſhewed, whereof he is crediblie aduertiſed. Well, if it be but ſo much, that the *eccleſiaſticall Iudge* (when he is called by his ſuperiour) muſt be able to make proofe of ſome ſuch: it is more then a *Iudge* or *Iuſtice* of *Peace* neede ſhew, why he calleth any man into queſtion, or bindeth him to the peace, or to the good behauiour. And what lawes can be deuiſed, but they may be abuſed? whatſoeuer hath an vſe, hath alſo an abuſe, ſauing vertue, ſaieth [3] *Ariſtotle*. Yet if he be an *Ordinarie* (as hath bin aforeſhewed) ſuch grounds of his proceeding muſt appeare in Acts *Iudiciallie*, or be well prooued: or elſe (vpon an *Appellation*) his proceeding is to be refourmed.

[3] Ariſtot. in Rhetoric.

Beſides, is it not more probable that a *Partie* which will accuſe, ſhall doe it of malice to vexe oftentimes an innocent, and to bring him into perill; then a *Iudge* who reapeth no commoditie thereby, but ſatiſfaction of his duetie? and is not he more like to deale in theſe cauſes with ſinceritie, then *quilibet è vulgo*? yet by this opinion, ſuch are permitted to *accuſe* and to preferre matter againſt any, though no *fame* nor other matter, no not ſo much as *ſuſpicion* doe appeare againſt them.

Is it not then all one, whether the innocent man be wrongfully vexed by the *Iudge*, or by a priuate perſon, who (in a maner) pro-

profeſſeth, that he doeth it of malice? neuertheleſſe for all this inconuenience and abuſe that may happen, it will not be thought conuenient (I truſt) to damme vp the way from euery man both *Iudge & partie*, to preferre ſuites againſt offenders. For if it ſhould ſo be, in ſhort time there would bee neither *Iudge* nor other, but lewd perſons onely; and they might liue as they liſt.

Yea, but it ſeemeth vnreaſonable (will ſome man ſay) that a man ſhould be called into queſtion and not to know his *Accuſer*. Surelie if the way of proceeding by *Accuſation* be taken, he is to know him: but when by *Enquirie*, though for the moſt part the *Denouncer* is knowen, yet there be many weightie and very conſiderable cauſes, why euen *witneſſes* in cauſe of hereſie: and much leſſe thoſe that gaue the information, ſhould not bee knowen; which euerie man of himſelfe, without rehearſall, can weie and call to mind.

Beſides, this obiection maketh nothing againſt all proceeding *ex officio*. For when it is grounded and inſtituted vpon a *Preſentment* by *officers* ſpecialie appointed, their names are knowen to him whoſe proceſſe is made. Yet I muſt tell you, that hereby it commeth oft times to paſſe, that meane men in pariſhes abroad, and for very foule crimes, do rather make choiſe to be bold with their oath and conſcience, then with a delinquent, whom they haue ſome occaſion to feare.

But (I pray) what neceſſitie is there (in Iuſtice) of knowing the *Relatours*? may not a *Iurie* endite a man without any cauſe openly appearing, as when the matter is either knowen to ſome of them aforehand, or the *Euidence* (as ſome times happeneth) is not giuen openlie? which caſes happening, the partie endited ſhall neuer know who gaue the *information*, becauſe they are ſworne to keepe ſecret the *Queenes*, their owne, & their felowes counſell. Which courſe for the trouble of the partie ſuppoſed to be delinquent, doeth amount to as much, as if the Iudge *ex officio mero* had done it.

When the *Lords of the Counſell* haue a ſuppoſed malefactor in examination, are they bound in *Iuſtice*, or were it but good policie to ſignifie vnto him, who it is that giues the information; and to confront them together at firſt daſh? but howſoeuer theſe (by circumſtances) ſhould be thought fit to be caried, it is neither to

nor fro, to the condemnation of all proceeding vpon the *office* of the Iudges onely, as vniuſt, whether a man know or be ignorant, who made the *Denunciation*.

CHAP. XII.

A Replie to the Note-gatherers *anſwers, giuen to certaine reaſons that haue bene made long agone, for to ſhew the like courſe to be alſo practiſed in* temporall *courtes: and an anſwere to his reaſons brought to proone, that in proceeding of* Office, *there is ſome contrarietie to the lawes of* England.

SIr *Thomas More* in his aforeſayd *Treatiſes* (to ſhew that it is not ſimply vniuſt, vpon ſome occaſion to conceale the names of thoſe that gaue the information) alleageth, that in like ſort *at the Common law a man may be endited, & none euidence openly giuen at the barre: and that the enditers be bound to keepe the kings counſaile cloſe*. To this the *Note-gatherer* anſwereth; firſt that *before the partie anſwere, or bee arraigned, he knoweth the matter wherewith he is charged*. So doeth he alſo in *eccleſiaſticall* courtes, ſo ſoone as the matter is obiected vnto him. Secondly, that *the inditement goeth to particular matter, & it muſt be certaine*. And ſo do articles alſo in a court *eccleſiaſticall*. Thirdly, *that they which indite him, ſhall not be Iudges of him nor arraigne him*. No more ſhall they who *preſent or denounce* a man to an *eccleſiaſticall* Iudge, be Iudges of him: and therefore (whatſoeuer the *Note-gatherer* ſay to the contrarie) it is not *aliter ex officio*. Fourthly, that *Iudges in ſuch a caſe are to proceed circumſpectlie*. And ſo muſt they doe in other caſes as well as this: and ſo muſt *eccleſiaſticall* Iudges alſo. Fiftlie, *that two witneſſes muſt be at the arraignment, vnleſſe the partie willingly confeſſe the ſame*. And ſo it is in courts eccleſiaſtical. For without the parties confeſſion, or two witneſſes; none may be abſolutely conuicted. And yet this which he here ſaieth, is not generall in all *arraignments*. For the ſtatute [1] made the 1. yeere of K. *Edward* the 6. (which hereunto he voucheth) mentioneth to this purpoſe onely treaſon and miſpriſion thereof. The ſaid ſtatute is alſo repealed ſince by Q. *Mary*. The other ſtatute [2] *1 & 2.* of *Philip* & *Mary*, that he alleageth, is onely for ſuch triall of treaſons, that be made treaſons by that *Act*. For the

[1] 1. Edw. 6. c. 12.

[2] 1 & 2. Ph. & Mar. cap. 10.

theſelfſame *Act* doth appoint, *all other trials of treaſon to be made according to the due order & courſe of the Commō lawes.* But though it were ſo, that at all trials two witneſſes ſhould of neceſſitie be preſent: & though it were admitted, that his other foure anſwers were true in fact, & that the courſes of proceedings eccleſiaſtical were to the contrary: yet theſe do not any way impugne or ouerthrow ſir *Th. Mores* reaſon, viz. *that mē may be endited, & not know who gaue the euidence or preferred it; in like ſort as ſome know not who preferred vp matter of crime againſt them into courts eccleſiaſticall,* and therefore this muſt needs be wholy impertinent, and beſides the purpoſe.

Vnto another reaſon of ſir *Th. Mores* (grounded alſo vpon reſemblance of the practiſe at the *Common* law, vnto the *eccleſiaſticall* in this behalfe) viz. *that a man may be at that law arreſted and impriſoned, onely vpō ſuſpicion:* he frameth two anſwers. The firſt of them is, *that at the common law there muſt be a fact precedent, whereby a cauſe of ſuſpicion muſt be grounded: otherwiſe there lieth an actiō of falſe impriſonmēt.* What? If an offence appeare to be done, ſhal this be ſufficient (without all peril) to ground a ſuſpicion againſt any man whomſoeuer, that it was he which did it, & ſo to impriſon him? Neither yet is it generall, *that a fact muſt be precedent,* before a man be arreſted. For if it be a fact of ſuch qualitie & nature as leaueth traces & ſignes after it; as murder, Coining, and ſuch like, which be called by *Ciuilians, facta permanentia;* in thē it is true that a fact muſt be precedent. But in ſuch facts, as leaue no ſuch traces behind them, ſo ỳ it is not certain whether they be cōmitted at all or not, & yet probabilities thereof doe appeare (as of ſpeaches, ſecret treaties of cōſpiracie & treaſon:) for ſuch facts a ſuſpected partie may be *arreſted* and *impriſoned,* though it be not aſſuredly knowen, whether the fact be committed at all, or not. And theſe are called *facta tranſeuntia.* Neuertheleſſe, this is not in any ſort, an anſwere vnto ſir *Th. Mores* reaſon. For admit that a fact muſt alwayes be precedent: neuer the later this remaineth true, that *a Iuſtices onely ſuſpicion may ſerue to arreſt and impriſon a man.* And yet the law eccleſiaſticall (for which *More* reaſoneth) doth in trueth requite ſtrōger grounds for *enquirie ſpecial,* thē the *Iudges* only *ſuſpiciō,* as is afore at large in this ſecōd part declared.

The *Note-gatherers* later anſwere vnto that reaſon of *Mores*

is; that a felonie or murder being done, and a fact manifest, the partie apprehended and ſuſpected, knoweth that he is to anſwere that facte, and not other by-wayes, as is vſed in the eccleſiaſticall proceedings. Trulie, of all that euer I heard, theſe anſweres be *by-wayes*, and beſides all way too, of any reaſonable anſwering obiections. It may be that the partie himſelfe (eſpeciallie if he be not guiltie) knoweth not (till hee be asked) the very particular cauſe of his apprehenſion.

But it will be ſayd, that vpon his examination, hee learneth what it is. Why ſir, and ſo doe all that be conuented in courtes *eccleſiaſticall* know by their examination, the matter obiected. Then where is the difference and the *by-way* that this man ſo talketh of? But will you ſee his clerkelie vayne of reaſoning herein? For it is, as if he had gathered it thus: viz. *A man arreſted, knoweth that he is to anſwere a fact which is committed:* Ergo, *Albeit at the common lawe a man may bee arreſted vpon ſuſpicion: yet proceeding* ex Officio *is vnlawfull, how good grounds ſoeuer there be for it, farre ſounder then ſuſpicion.*

For another inconuenience of proceeding *by office*, importing with all a *Contrarietie* to the lawes of the Realme, the *Note-gatherer* aſſigneth; that *thereby the Acceſſarie may be puniſhed, and the principall may eſcape; which is contrarie to the Common law.* The conſequence hereof he goeth about to prooue thus: For that (as he ſaieth) *the Principall may (in thoſe courtes) be an Informer and a witneſſe both againſt the Acceſſarie.* By which ſaying, his ſlender skill or experience in thoſe lawes appeareth. For it is moſt notorious, that there is no better nor more vſuall chalenge & exception againſt an Informer or witneſſe; then to alleage *quod eſt particeps vel ſocius criminis prætenſi.* Albeit euen at the *Common lawe*, we vſually ſee partakers and complices in *coining*, in other kindes of *treaſon*, and for ſundry hainous crimes (eſpecially which are ſecretly contriued) to be admitted to appeach and to be witneſſes, and to giue euidence againſt others their partners.

He affirmeth alſo, but maketh no ſhew of proofe thereof; *that hereby the two Iuriſdictions be confounded; and that proceeding of office is derogatorie to the lawes, liberties, and cuſtomes of England.* In which reſpect, it is ſufficient that theſe be as eaſilie by vs denied, as they be barelie, boldly, and vntruly by him auouched.

He

He further allegeth in three places (as if it were a matter very conſiderable) out of *Hall*, and the *Actes and Monuments of the Church*, that by the ſtatute of *25. H. 8. cap. 14.* all proceeding *of Office* is repealed; and calleth the ſtatute againſt *Hereſie*, *1. H. 4.* the ſtatute *ex officio*, as if it had bene vnknowen before. Firſt, that very ſtatute [1] it ſelfe of *H. 8.* ſtandeth repealed. Secondly, it is very vntrue, that it did at any time repeale proceeding *of Office*. For it doth not ſo much, as once mention it. And therefore what any writers do name the ſayd ſtatute of *H. 4.* thereby repealed, as I haue not ſought, ſo is it not materiall; ſeeing they miſunderſtand it, if they ſo write. Yea, the *Notegatherer* himſelfe yeeldeth, that the ſayd ſtatute of *K. H. 8.* doth eſtabliſh proceeding *of Office*, if he vnderſtand what himſelfe writeth. For it doth appoint (and ſo he allegeth it) that from thenceforth proceedings againſt *Heretikes* ſhould be vpon *accuſation* or *preſentment*. If vpon *Preſentment*, then of conſequence by the *Iudges Office*. For ſo all lawes teſtifie; and *Preſenters* be not *Accuſers* or *parties*. For they are ſeuered & counter-diuided euen in that very place, one againſt the other.

[1] 1. Eliz. cap. 1.

The principall drift of that ſtatute of *K. H. 8.* was to prouide, that an *Ordinarie* vpon his owne onely *ſuſpicion* ſhould not call men into the dangerous queſtion of *hereſie*, as (it ſeemeth) was afore vſed by ſome of them vpon colour of that ſtatute *1. H. 4.* and therefore there repealed.

The next ſtatute, which to the ſame purpoſe he quoteth, [2] is ſo farre from impugning proceeding *of Office*; that for grounding proceeding eccleſiaſticall euen in the *crime of hereſie*, it prouideth beſides *Accuſation* and *Preſentment*, not onely *information* by two witneſſes; but alſo *enquirie*, and that is alwayes *of Office*. But do not theſe men draw neere the lees, when they are driuen thus to allege the ſtatute of *Sixe Articles* (being alſo repealed) againſt proceeding *of Office*? I had thought their courage in the pretended cauſe of ſinceritie, had bene ſo great; that they would rather haue quit the place, with loſſe of their cauſe, then once to haue borrowed ſo much as the ſhadow of a weapon, out of that ſtore houſe.

[2] 31. H. 8. ca. 14.

Againſt this courſe the *Note-gatherer* alſo allegeth certeine bookes printed in king *Henrie* the eights dayes *Cum priuilegio*.

These hee termeth to be *the maner of debating that cause in those dayes.* The first was made by *S. German* (as it is thought) and is intituled, *The diuision of the Spiritualtie and Temporaltie:* with his replie against *Sir Thomas Moore*, intituled *Salem and Bizance.* The next, *concerning the power of the cleargie and lawes of the Realme.* The third intituled, *Of the liberties of the clergie collected out of the lawes of the Realme by Iohn Goodall*, and printed by *Robert Wier*, but without priuilege. And the last, *Marsily Patauini Defensor Pacis* in *English*, with the *Kinges* and her *Maiesties* mothers armes; which (belike) hee mentioneth, that they may stand in stead of *priuilege.* But will you see, what great and strong debating there was of this matter, by the sayd foure bookes? Truely, sauing in the first of them, there is not a word mentioned against proceeding *of Office.* And in *Goodalles* booke, by sundrie places thereof (as is else-where in this *Apologie* alleged) this kinde of proceeding is plainely auouched to be a *Liberty of the Clergie*, giuen vnto them by the lawes of the Realme.

And all that is sayd in that one booke[1] and one onely place thereof, is no more but thus, worde by worde; *viz. Another cause of diuision, for that diuers suites haue bene taken* ex officio; *so that the parties haue not knowen, who haue accused them: and thereupon they haue bene caused to abiure in cause of heresie, sometime to doe penance, and to pay great summes of money for redeeming. Which vexation they thought came by the Iudges and the Officers.* Therefore the fault that hee then found, was not the very proceeding *of Office*; but for that it was handled in such sort, that the partie knew not who gaue the information, which he calleth *Accusing*; and for that it was in cause of *heresie:* being a crime of farre more important danger to the partie, then any other offence *Ecclesiasticall:* yet not challenging the very proceeding thereby for vnlawfull, but as being (with such circumstances) some cause of *diuision* betweene the two states, as he surmised. The soundnesse of which iudgement I minde not here to examine.

[1] Of diuision betwixt the temporaltie and spirituaitie. cap.7.

The *Note-gatherer* vrgeth further, that the Popish bishops were depriued in king *Edward* the sixt his time, by *Accusation* or *Presentment*; though (as it seemeth) hee knoweth not by whether

whether of them. But what if they at that time had bene proceeded with otherwise then *of Office*? Woulde this prooue all proceeding *of Office* to be contrarie to the lawes of *England*; which is his drift and purpose? Yet I haue often shewed afore, that *Presentment* is a preparatorie course peculiar onely to proceeding *by speciall enquirie of office*. But for plaine proofe in fact, that they were in deed proceeded with *ex officio Iudicum*; I referre me to the actes *iudiciall* of their depriuation yet remaning, and to that also which I haue written in a certeine chapter of the third part of this booke.

Heere it will not be vnseasonable to admonish the Reader once for all of a palpable [1] mistaking both of the *Note-gatherer* and *Treatisour* in a materiall point; who by the whole course of their writings and titles of their bookes, seeme to imagine, proceeding *ex Officio* to signifie nothing els, then *ministring of an oath to the suspected partie in a cause criminall*: Whereas (in verie trueth) there may be some proceeding *of Office*, though that oath be not at all vrged or vsed; yea and where it ought not to be imposed, though it were vrged. Like as on the contrarie side, there may be proceeding euen by way of *Accusation*, where the oath may and ought to be exacted for the parties purgation: perhappes burthened by great probabilities, yet not being so pregnant, as to conuict him. And therefore without all colour of reason, and ignorantlie doe they and some others (as the late *Petitioner* to her *Maiestie*) confound proceeding *of Office*, with ministring of an *oath*, being but one Act thereof: which is in deed sometimes, but not alwayes, no; nor yet alonely vsed in that course of proceeding. Neuertheless, taking it whether way they lust, the sayd *Popish bishops* were in trueth proceeded with *of Office*, though *denounced* by certeine, and (as is expreslie set downe of some of them) were vrged, and did answere the Articles obiected vpon their *corporall oathes*; which (by lawe) they needed not, and therefore (as it is likely) would not haue done, if the *Denunciatours* had beene *parties*.

[1] Aduertisement of an errour.

To prooue this course to be against law, he allegeth also out of a booke made [2] by *D. Parker* sometime *Archbishop of Canterbury* these words: *viz. The very front of her Graces articles* (meaning

[2] Defence of Priests marriages. pag. 175.

ning *Queene Marie*) *chargeth the eccleſiaſticall Ordinaries to put in execution the Canons and Eccleſiaſticall lawes, none other but ſuch, as were vſed in the time of king* Henrie *the eight. And commandeth alſo moreouer, that thoſe ſhould no further be put in execution, but as they may ſtand with the lawes and ſtatutes of the land.* What then? *Ergo*, all proceeding *of Office* (though continuallie practiced in ſundrie matters in both their reignes, without contradiction) *is contrarie to the Lawes of the Realme?* Truely, if there be one *methode* of ſound reaſoning (as *Ramus* holdeth concerning teaching of Artes) I would be ſorie this kinde of diſputing ſhould be it. For I haue not bene taught, nor ſhall euer learne (I thinke) either to reaſon thus, or to put ſuch *Enthymemata* into true *Syllogiſmes*; *viz. Such Canons onely were then to be put in execution, as might ſtand with the lawes of the Realme.* Ergo, *proceeding* of Office *is contrarie to the lawes of the Realme.*

His laſt allegation (falling into this place to be diſcuſſed) that he bringeth in maymed alſo, to prooue this proceeding to be againſt the lawes of *England*, is out of one of her *Maieſties* [1] Iniunction. 30. *Iniunctions*, [1] *Againſt ſlanderous and infamous wordes*, which is thus *verbatim: viz. Her Maieſtie ſtraitly commandeth all maner her ſubiects, to forbeare all vaine and contentious diſputations in matters of religion: and not to vſe in deſpight or rebuke of any perſon, theſe contentious wordes*, Papiſt *or* Papiſticall heretike, Schiſmatike, *or* Sacramentarie; *or any ſuch like wordes of reproch: But if any maner of perſon ſhall deſerue the accuſation of any ſuch; that firſt he be charitablie admoniſhed thereof: and if that ſhall not amend him, then to denounce the offender to the* Ordinarie, *or to ſome higher power, hauing authoritie to correct the ſame.* But what (I pray) can be gathered hereof, more then a care to reteine priuate perſons in a charitable courſe, one towardes another, without reprochfull wordes, vpon any differences of opinions? Or doth this reach to the abrogating of any courſe of proceeding? Nay, rather it doeth eſtabliſh it, ſeeing vpon *Denunciation* (which is heere mentioned) proceeding *of Office* may be grounded, but not *Accuſation.*

But the *Treatiſer* ſaith that *heereby the ſame man is Iudge and Accuſer: which is contrary to the policy of this Realme, that ſuffereth*

not

not an Accuſor to be a witneſſe, nor an Enditour to be a Iuror for triall of the fact. I anſwer, that the firſt is vntrue. For that which openeth way to the Iudges *Enquirie* is holden (by Lawe) as the *Accuſour*, and not the *Iudge*. Touching the ſecond, I haue ſhewed out of ſtatutes, that *witneſſes* be called *Accuſors*: therefore that is not contrary to the policie of the *Realme*: and yet is it contrary to *Ciuill* and *Canon* Lawes. For the thirde; if his reaſon *a ſimili* be good, then is the *Iuror* as a *Iudge*, and the *Enditour* as an *Accuſour*. And in deede what doe their affections differ? and yet what more frequent then for an *Enditour* to giue in euidence vpon his othe; or for one *Iurour* vpon his owne knowledge, to get an *Enditement* found? Therefore for a *witneſſe*, to be a kinde of *Accuſour*; and an *Accuſour* to be a kinde of *Iudge*, *is not contrary to the policie of this Realme.*

Hitherto in anſwere of allegations, and obiections made againſt proceeding *of Office*, and brought for proofe of ſome contrarietie, vnto the Lawes of the *Realme.*

CHAP. XIII.

That the Enquirie ex Officio *againſt* Crimes, *is allowed both in* Ciuill *or* Temporall *Courts and in Eccleſiaſticall alſo, by the two Lawes* Canon *and* Ciuill.

TO proue that the *Canon* and *Ciuill* lawes both, doe allow of the courſe, I ſhall not neede to ſtand long: becauſe ſo much hath by the way very often, (though hitherto not of purpoſe) bene declared. To alledge therefore for the former once for all, *it is the* [1] *common opinion, that by the Canons, Iudges Eccleſiaſticall may indifferently in euery Crime* being *within their Iuriſdiction, proceede* ex Officio, *for the common beneſite.* And (as was vpon another occaſion alledged afore) [2] *when the Enquirie is made to the purpoſe of correcting for the ſoules health, and not of puniſhing, the Iudge may proceed* ex Officio, *though no fame were precedent.* And againe; [3] *when an Enquirie is made of any Crime committed againſt the Maieſtie of God, as hereſie, blaſphemie, &c. the enquirie is of validitie, though it be without the ſolemnities of place, time, &c.*

1 Archid. in c. ſolicis §. fin. de pactis in 6. & Marianus in c. qualiter & quando de accuſ. nu. 108.

2 Abb. in c. 1. de officio Ordinarii.

3 Angel. in §. fin. Auth. quom. oport. epiſ.

By the *Ciuill* Lawe it is ſo allowed of, as it is called a proceeding *per Nobile Iudicis Officium*. In the olde Common weale of *Rome*, what was more vſuall with their great Magiſtrates then *habere quæſtionem*, to make ſpeciall *enquiries* and trials of ſuppoſed *offenders?* one [1] or two in ſteade of many may ſuffice. *L. Poſthumius the Prætour had Tarentum aſſigned vnto him for his Prouince; and there he made ſeuere Inquiſition againſt ſuch Shepheards that had conſpired and lincked themſelues together, and made all High wayes and Commons (by their robberies) moſt dangerous to be paſſed. Of which ſort of perſons hee thereupon condemned ſeuen thouſand.* Thoſe Magiſtrates that [2] were called *Ædiles, had authoritie by their Office vpon a ſummary knowledge had of the cauſe* (ſuch as is vſed in *Pie-powder* Courts here) *to breake all vnlawfull meaſures, to ouerthrowe, deſtroy, and marre falſe and corrupted wares, and to puniſh thoſe that offered them to ſale:* yea and ſometimes alſo to beate with roddes. This proceeding was ſo well knowen to all in thoſe times, that *Tertullian* an auncient father of the Church doth put the *Emperours* to whom he writes, in minde of their owne lawes, whereof he there vrgeth [3] execution. *If I be not deceiued* (ſaith he) *the Ciuill Lawes doe commaunde, that malefactours be ſought vp and found out; and not to be concealed, &c. This is appointed by the decrees of the Senate, by the Ordinances of Emperours, and by the very Empire it ſelfe; whoſe miniſters you are.* And againe [4] in another place thus: *Nulla lex vetat diſcuti, quod prohibet admitti.* Whatſoeuer any Lawe forbids to be done, aſſuredly it permits to be ſought out, & ſifted. *Let vs ſee* (ſaith the [5] *Ciuill* Lawe) *whether a Gardein of an infant that is ſuſpected, may be remooued from his Gardeinſhip without any accuſation. and it is receiued that he ought to be, if by euident tokens it appeare to the Prætour, that ſuch a Tutour is to be ſuſpected.*

And albeit the [6] gloſſe ſay, that *ordinarily* (by that Lawe) *the Iudge proceedeth not* ex Officio: yet by reaſon of the ſtrait courſe holden thereby with all *Accuſours*, ſo that *Accuſation* is now almoſt generally through the worlde growen in diſuſe: it is therefore *by* [7] *ſuch generall cuſtome made lawfull in euery cauſe, for a Iudge to proceede (at the Ciuill Lawe) ex Officio.* So that *(conſidering ſuch* [8] *cuſtome) it is as ordinarie a remedy now, as Accuſation.* And ſome reaſon hereof is aſſigned to be this, that the Lawe iudgeth

[1] Liuius lib. 39.

[2] L. 12. ff. de peric. rei vend. l. 14 ff locati. l. 22. ff. de decurionibus.

[3] Tertullian. in Apolog. ca. 2.

[4] Tertullian. ibid. c. 4.

[5] L. 1. §. Præterea. ff. de ſuſpect. tutoribus.

[6] Gloſſ. in l. 2. §. ſi publico. ff. de adult.

[7] Gandinus de malefic. tit. quomodo cognoſc. nu. 6. & paſſim alii.

[8] Bald. in l. 1. §. in initio. ff. de offic. præſidis.

iudgeth euen an *Accuſour* not to be wanting in ſuch proceeding, for that [1] *in euery Crime, Fiſcus eſt Accuſator*, the common intereſt is the *Accuſour:* and it is ſo farre from being a courſe diſallowed by that Lawe, that [2] *(albeit there were no ſuch cuſtome at all) yet there be very many caſes, wherein by the very expreſſe diſpoſition of that lawe, the Iudge may proceede* ex Officio. Nay it is thus teſtified by a great Lawyer, that [3] *in any caſe whatſoeuer euen by the Ciuill lawe, it is permitted to the Iudge to proceede of Office, and ſo by way of Enquirie.*

[1] Prac. Millei. fol. 3. nu. 31.
[2] Angel. de malef. ver. hæc eſt quædam. & ibi Aug. in addit. a. nu. 12. vſque ad 48.
[3] Io. Andr. in add. Specul. tit. de Inquiſitione. §. quando autem.

And this is receiued, not onely in publicke and popular miſdemeanours, but alſo in priuate offences. *For* [4] *in theſe (without either complaint or Accuſation) the Iudge may proceede of Office by way of Enquirie. Albeit the Lawe ſet not downe for ſuch, any certaine (either corporall or pecuniarie) penaltie; for then ſuch an offendour is puniſhable, by ſome extraordinary penaltie. The reaſon of this proceeding in priuate Crimes is, the very intereſt, that the Common wealth hath, to haue ſuch offences puniſhed.* By reaſon of which common intereſt, [5] euen where there is an *Accuſer*, yet *if hee be away, the Iudge* ex Officio *may proceed and go on in the cauſe. And ſo it is obſerued by common practiſe*, in *Ciuill* lawe Courts. The like is to be ſaide when the *partie* wil collude with the [6] malefactour: for *if he that was robbed will collude with the thiefe, and ſay hee was not robbed: yet if there be likelyhood to the contrary, the partie is not beleeued, but the Iudge proceedeth* ex Officio, quia intereſt Reipub. puniri furtum.

[4] Decius conſ. 170. nu. 1. quòd eſt communis opinio.
[5] Bald. in l. 1. C. qui accuſare non poſſunt.
[6] Bartolus in l. inter omnes §. rectè ff. de furtis.

Touching the penaltie due, vpon ſuch proceeding, ſome writers holde, that [7] *the ordinarie paine appointed by Lawe, is not to be inflicted vpon proceeding of Office.* But they alſo make theſe exceptions: viz. that this doth not holde, [8] *where the Crime is notorious:* nor [9] *where the defendant vpon the enquirie confeſſeth the Crime:* nor by the [10] courſe of the *Ciuill* Lawe. For in theſe caſes they affirme that the very ordinarie paine (expreſſed in the Law) may be impoſed. But it is aſſured, [11] that *by Cuſtome at both theſe Lawes not onely a milder paine, but the very ſet paine of Lawe it ſelfe may be inflicted, euen when a Iudge hath proceeded of Office.*

[7] D D. in c. quaſiter. el. 2. de accuſ.
[8] Innoc. in d. ca.
[9] Card. Alexand. in c. de accuſat. col. 39.
[10] Plerique omnes D D.
[11] Clarus lib. 5. § fin. qu. 49.

But here ſome may obiect, that thoſe Lawes do ſeeme ſometimes to require an *Accuſer*. It is true: but neither alwayes, nor of neceſſitie, as hath bene opened. And it is ſhewed afore,

that publike intereſt ſtands in ſteede of an *Accuſer*. Likewiſe the [1] Lawe accounteth *fame* precedent to be a *kinde of Accuſer*. And where *fame* wanteth, other [2] preſumptions, and *Indicia or euidences are (in this behalfe) equiualent vnto a fame.*

[1] c. qualiter & quando el. 2. de accuſat.
[2] Bartol. in l. congruit. ff. de Off. præſidis.

It may further perhaps be vrged, that by *Ciuill* lawe, this *Enquirie ex officio*, is counted an extraordinarie remedie. If it were ſo admitted to be, what would this auaile thoſe, that oppugne it ſimply? for the rule is, *Vbi ceſſat remedium Ordinarium, ibi decurritur ad extraordinarium.* And it is not holden, nor is otherwiſe likely, if a *partie* will ſeriouſly and with effect proſecute, but that the *Ordinarie Iudge* will ceaſe further to deale therein, *ex officio:* yet it is a little afore ſignified, that by reaſon of ſuch generall cuſtome, this *Enquirie ex officio*, is become, euen by the *Ciuill* Lawe, to be an *Ordinarie* remedie. And beſides that cuſtome, *whereſoeuer* [3] *Enquirie of office is ſpecially permitted either by Lawe* (as in many caſes) *or by ſtatute, there it is as ordinarie a remedie as Accuſation.* And by the [4] *Canon* Lawe, it is abſolutely *an ordinarie remedie.*

[3] Specul. Marran. de Inquiſit. nu. 39.
[4] Ibid. nu. 48.

I haue alſo heard it to haue bene obiected againſt this courſe, that bad and infamous perſons ſuggeſtions haue bene accepted. If it be ſo, it is but the fault of perſons, not of the Lawe. And if by an *Appellation* from any *ordinarie* Court, this point come to hammering; it wil not be found abſolutely iuſtifiable, yet experience teacheth, that not onely *Relatours* (that be *infamous* and bad perſons) be in ſome caſes admitted by the Lawes of this *Realme*, but (which is more) they are permitted alſo to be *witneſſes.* As both *infamous* perſons, and thoſe that be partakers with the appeached in treaſons, murders, and felonies: which is permitted in fauour of the *Prince* and common wealth, in deteſtation of ſuch grieuous crimes, and for the very nature of the crimes, which are (for the moſt part) ſo perfourmed; as none honeſt perſons, but ſuch as themſelues, are or can be priuie vnto them.

Vpon the ſame grounds, the *Ciuil* Law alſo admitteth the like witneſſes. Therefore is it teſtified to be [4] *the common opinion of writers in that Law, that for the horriblenes of ſome crimes, witneſſes otherwiſe diſabled in Law, may be receiued, as in hereſie and in Treaſon. Alſo when the trueth of the matter cannot otherwiſe bee had: therefore the rule is, that when the facte is of ſuch qualitie, that other*

[4] Decius conſilio 342. nu. 8.

witneſſes

witneſſes cannot by any poſſibilitie be had, in ſuch caſe thoſe ſhalbe admitted, that are in other caſes forbidden by lawe. Therefore none of theſe, nor any ſuch like friuolous obiections, will be able to ouerthrowe this courſe ſo manifoldly grounded both vpon thoſe former ſeuerall lawes, and alſo vpon reaſon.

CHAP. XIIII.

An anſwere to ſuch obiections, as vpon the Ciuill *or* Canon *lawes are brought againſt all proceeding* of Office *in cauſes* Criminall *by the* Treatiſour *and the* Note-gatherer.

AGainſt all that is or may be brought out of thoſe two lawes for confirmation hereof, the *Treatiſour* rather exclaimeth, then obiecteth; that they are *ſtrange lawes, ſtrange and forreigne proceedings*; and I knowe not againſt what pretended *ſtrange* courſes, he bitterly inueieth: as if nothing that is vſed els-where in the world, could ſauour of *Iuſtice* beſides our owne; or might be receiued amongſt vs, howe apt or beneficiall ſoeuer it be otherwiſe. Neuertheleſſe, we finde in the bookes of termes and yeeres, many things reported out of the *Ciuill* and *Canon* lawes; yea & many rules taken out of them, which are there both alledged and allowed of. That ſage and prudent *Senate*, with the whole people of *Rome*, when of *twelue Tables* (which conteined the ground of all their lawes) tenne of them were tranſcribed & taken out of the lawes of ſundry common weales then in *Greece:* they neither helde it any diſparage to their owne Nation; nor in that reſpect accounted them the leſſe to be *Romane* lawes.

Though it were graunted, that the proceeding *of office* in Courtes *Ciuil* and *Eccleſiaſticall* with vs, was drawen at firſt from thoſe two lawes: yet the ſame or like proceeding, which is vſed in ſundry *temporall* Courtes here; perhaps will not be iudged to haue bin taken and borrowed from thoſe two lawes; but rather to haue bin the very olde originall cuſtome and *Common* lawe of the land. Which conſideration (if it be true) muſt needes (in mine opinion) make much for the approuing of the reaſonableneſſe and equitie of that proceeding: when as ſeuerall nations, by

one inſtinct of the light of reaſon, haue ſo long iumped & hitte vpō one & the ſame courſe; without borrowing it, the one of the other. But frō whence ſoeuer any of theſe courtes in this lād, haue borrowed their proceeding *of office*; ſeeing *temporall* Courts of the Realme haue practice of the like courſe, & thoſe lawes do allow it alſo vnto Courtes *eccleſiaſtical* according to the vſe euen of ſo many hundreths of yeeres, as this Nation hath bin *Chriſtian:* therefore theſe [1] proceedings ought not now at length to be accounted either *forreine* or *ſtrange* from our policy, but rather as our owne homebred *Engliſh* lawes, and her *Maieſties lawes eccleſiaſtical*, as they be often termed in actes of *Parliament*. It is true which is ſaid out of the *Ciuil* law, *Ea noſtra facimus, quibus auctoritatem* [2] *noſtram impartimur: Thoſe things we make ours, vpon which we beſtowe our authoritie*, whether expreſly, or by implication, vpon long continuance of practice.

[1] Vide preamb. ſtat. 25. H. 8. c. 21.

[2] l. 1. C. de Vet. iure emendando.

The *Note-gatherer* to the intent to proue (as may be gathered) that the *Ciuil* lawes doe diſallow this proceeding, ſaith: *It is to be proued, that the Pagan Greekes and Romanes, ordinarily vſed In criminibus violatæ religionis, no ſuch maner of proceeding, but Per accuſationem.*

It is warely ſaid by him, that *it is to be proued*; becauſe as yet it is not done. But if it could be proued, that they vſed none other (the contrary whereof is made apparant) doth it thereupō follow, that we may not; or that al other courſes be vniuſt? or if they vſed not any other, then *Accuſation ordinarily*; that therefore they vſed not proceeding *of office* at all? or if not in that one crime *violatæ religionis*; that therefore in none other *crime* whatſoeuer?

Vnto this Chapter are many of thoſe quotations to be referred, which the *Note-gatherer* hath muſtered and thronged together in his firſt title, which is this, viz. *teſtimonies out of the auncient fathers, that doe miſlike the proceeding ex officio, and othe nowe vſed.* But like as many of them be altogether mutes, both in the one point and the other: ſo ſundry of them that are compelled to giue euidence and to ſay ſomewhat; doe not once mention an othe; yet happely ſpeake ſomewhat of *Inquirie* or *Accuſation*. Yea, and his maine concluſion, which he propoundeth vnto him ſelfe in that title to prooue, reacheth no further, nor is otherwiſe then thus: *Inquiſitio ab imperatoribus prohibita*. Such of them therefore belong to this diſputatiō. But this concluſion of his might be

true;

true; and yet neither the *parties oath* in a *criminall* cauſe any whit impeached; nor all proceeding *of office* thereby diſallowed. Neuertheleſſe whether all proceding by *enquirie* be prohibited by the Emperors ſhal appeare. For I mind here to examine euery of his quotations falling into this place by peece-meale. In that his quotation out of *Euſebius* 3. booke and 30. Chapter, no matter (ſounding to either of theſe wayes) is conteined: but he writeth there of *S. Ignatius*. Likewiſe in his 4. booke. & 13. Chap. nothing is touched, but of *Polycarpus*. And in the 17. Chapter of the ſame booke, no more. For he only mentioneth there the writings of *Iuſtinus Martyr*.[1] *Paulus Diaconus* in the place by him quoted, but not alledged (for he alledgeth no place at all in that whole title) ſaith thus: *Traianus the Emperour writ backe to Plinius Secundus, Chriſtianos pro ſide nullatenus inquirendos: that Chriſtiãs for that they beleeued, ſhould* not at all *be enquired after, or ſought for*. To the like effect *Tertullian*[2] ſaith in the place by him quoted, viz. *Traianus reſcripſit hoc genus inquirẽdos quidem non eſſe; oblatos verò puniri oportere; Traian by his reſcript decreed, that this kind of men ſhould not be enquired after: but being offered or bit vpon ſhould be puniſhed.*

[1] Paul. Diacon. lib. 10. in v. ta Traiani.

[2] Tertul Apolog. c. 2. Nicephor. li. 3. ca. 17.

It is manifeſt therefore hereby, that albeit in ſome fauour to the *Chriſtiãs* (whõ he ſaw ſo cõſtantly & in ſuch multitudes, litle leſſe then to offer thẽſelues vnto death for profeſſiõ of *Chriſt*) he cõmanded, that they ſhould not of purpoſe be *enquired* after and ſought vp, which is done by *general enquirie*, & not by *ſpecial*: yet notwithſtanding neither the one *enquirie*, nor the other was by him cõdemned or forbidden. For *ſpecial enquirie* is not ſpoken of there at al: & *general enquirie* (as I ſhewed afore[3] out of *Duarenus*) is hereby plainely eſtabliſhed; inſomuch as this courſe (being but nowe newly forbidden) doth proue, that it was lawfull and in vſe afore: and being but cõcerning *Chriſtians* only, it argueth that al malefactors beſides, were ſtil (as they had bin before) *enquired* after, and diligently ſought vp, the lawe *Ciuill* being left, as it was afore. But how lawfull & expedient *Tertullian* thought *enquirie* to be (if the *Chriſtians* had bene malefactours in deede, as the *Emperor* & other heathen then held them) the next words following[4] conteyning his iudgement touching that *decree*) doe plainely ſhew. *Oh* (ſaith he) *what a decree is this, that neceſſarily ouerthroweth & confoundeth it ſelf? He denieth that they are to be enquired, as holding them innocents; & yet appoints thẽ to be puniſhed as malefactors:*

[3] 2. part. c. 9.

[4] Tertul. Apolog. cap. 2.

malefactors: he ſpares them, and is cruell towards them: he winkes at them, and yet doeth puniſh them. How falles it out (ô Emperour) that thou entangleſt thy ſelfe by thine owne iudgement? Si damnas, cur non & inquiris? If thou condemneſt them, why doeſt thou not alſo vſe enquirie againſt them? If thou wilt not vſe enquirie towards them, why doeſt thou not quit them, as guiltleſſe? Through all thy Prouinces, for ſearching vp of Robbers, Militaris ſtatio ſortitur, certaine ſet ſouldiers (called Stationarij) are by lotte aſſigned: and againſt traytours and common enemies euery man is as largely authoriſed, as any ſuch ſouldier. Yea, and Inquiſition doth reach alſo vnto Complices and concealers. Then belike of all other, onely a Chriſtian may not be enquired againſt, and yet he may be offered vnto puniſhment.

Hereunto alſo ſerueth that, which the ſame auncient father writeth in that booke afterwardes, and is alledged by *Nicephorus* in one of the places [1] that are quoted by the *Note-gatherer:* ſo farre is it from ſeruing his turne any way. *What vniuſtice then doe ſuch Iudges to vs (ſaith Tertullian) which make enquiries alonely againſt vs, and that wickedly, vniuſtly, and cruelly? Whom Veſpaſianus albeit a conquerour of the Iewes, commaunded not to be ſtraitlie watched: For whoſe ſake, Traiane in part diſanulled the publike lawes, in that he forbade Chriſtians to be enquired after: and whom neither Hadrian (albeit he was a moſt curious ſearcher into all matters) nor he that was named Pius, would allowe to be perſecuted.*

[1] Tertul. Apolo. c. 6. Niceph. li. 4. cap. 12.

The olde Ciuill lawes appointed enquiries.

Yet if this prohibition of *Traiane* had bin ſo to be vnderſtood, that *ſpeciall enquirie* ſhould not be vſed againſt *Chriſtians:* howe litle neuertheleſſe this would make for the abſolute condemnation of all proceeding in that courſe, may appeare by the like decrees, which were alſo made by Emperours in fauour of *Chriſtians*, that they ſhould not ſo much as be *accuſed*. For the ſame father elſe-where faith thus: [2] *Tiberius Cæſar perſiſted in his opinion, and threatned great dangers to all Accuſers of Chriſtians. Nicephorus* likewiſe, in the next aforeſaid place, [3] alledged by the *Note-gatherer* himſelfe, thus writeth out of *Tertullian: That Marcus Antoninus the Emperour, after that the Chriſtian Legion in great diſtreſſe of his whole hoſte (being readie to periſh for thirſt) had by prayer obteyned a ſhower at Gods hand; did appoint a fearefull kinde of death to all that woulde inſtitute Accuſation againſt any Chriſtians.*

[2] Tertul. Apolog. cap. 5.

[3] Niceph. li. 4. c. 12.

To

To the ſame purpoſe both *Euſebius*, [1] and the ſayd [2] *Nicephorus*, doe write in two places (quoted alſo by the *Note-gatherer*, as if they ſerued his purpoſe) out of *Antoninus* his edict. *My father* (ſaith the *edict*) *did decree, that this ſort of men ſhould not be troubled, except they commit ſome crime againſt the* Romane *empire.* And therefore, *if any ſhall hereafter dare to trouble or impute crime vnto any Chriſtian, only for that he is a Chriſtian; let him that is ſo accuſed, be acquited; albeit he be found indeed to be a Chriſtian. But let him that accuſed him be duely puniſhed, as he hath deſerued.*

[1] Euſeb l.4.c.13.
[2] Niceph. li.3. c.28.

Now becauſe in fauor of the *Chriſtians*, theſe ſeuerall *Emperours* did command aſwell that they ſhould not be *accuſed*, as *Traian* did that they ſhould not be *enquired* after & ſought vp: ſhall we therefore hereupon gather, that neither *accuſation* nor *inquiſition* might be vſed by the law of the *Romanes* againſt any offenders? or that theſe ancient fathers (which report thē) miſliked of both thoſe proceedings, and ſo (vpon the matter) condemned all proceeding & puniſhing of any offenders whatſoeuer? But if this be moſt abſurdly gathered; then conſequently are theſe his allegations friuolouſly and abſurdly alleged, to proue, either an abſolute or ſimple prohibition, or any miſlike at all of proceeding by *enquirie* and *of Office* againſt offenders.

In *Dion Caſſius* (whom to like end he quoteth) the life of the *Emperor Nerua* is not found. In *Dion Nicaus* abridged by *Xiphilinus*, [3] theſe words be read in the life of *Nerua*, which it may be he meant. Τοῖς δ' ἄλλοις οὐτ' ἀσεβείας, οὔτ' ἰουδαϊκοῦ βίου κατηγορεῖσθαι πάνυ συνεχώρησεν, *The emperour would not permit the reſt, to accuſe certeine perſons either of impiety, or of Iewiſh profeſſion:* by which terme the *Chriſtian* religion is thought to be meant. What? Becauſe he forbad certeine to be *accuſed* of thoſe crimes, doth it hereupon follow that *enquirie of Office* (which is a ſeuerall courſe from *accuſation*) was wholly miſſliked? This might therefore with ſome more colour (conſidering that which followeth) haue bene brought againſt the courſe of proceeding by *accuſation*, and yet impertinenly enough alſo, For in the ſame place [4] it is recorded thus: παραχθεὶς γὰρ θορύβου ἐκ τῆς τύχοντος εἰς τὸ πάντας πάντων κατηγορεῖν. *No ſmall tumult was ſtirred vp hereupon, for that euery one did accuſe whom he liſted.*

[3] Xiph. in Nerua.
[4] Ibidem.

There remaineth yet one quotation to be ſpoken of, that is to be referred to this place, which he bringeth out of *Euſebius* [5] and

[5] Euſeb. li.4.c.9. Niceph. li.3.c.37.

Nicephorus; where *Adrian* the Emperor thus writeth vnto *Minutius Fundanus*. *If the men of that prouince in iuſtification of their requeſt can bring and affirme any thing truely and plainly againſt the Chriſtians, whereby before the tribunall ſeat by due courſe of iudgement they may be conuicted: then let them onely bend themſelues to that purpoſe. But I can by no meanes endure it, that they ſhould be put to death, onely vpon the petitions and out-cries of the multitude.* But this hath no kinde of ſhew, either againſt *Accuſation* or *Enquirie of Office*. For it condemneth only the mercileſſe and cruell iniuſtice of ſome Deputies; who to gratifie the clamorous common people, were contented to execute the poore *Chriſtians* without any proofs.

To this place perteine alſo the *Note-gatherers* allegations [1] out of the *Canon* law: yet they are ſo far from impugning proceeding *by way of Enquirie*, that they do very eſpecially eſtabliſh it. Which though he be not ignorant of, and being ſo plaine, cannot diſſemble: neuertheleſſe he doth ſumme them, & withall affirmeth (though vntruly) that the biſhops proceedings are to the contrarie; whereas all *eccleſiaſticall Iudges* will yeeld vnto him, that thoſe *Canons* both are and ought to be obſerued, ſo far as the ſtatutes of the Realme doth warrant them; ſauing in ſuch points as himſelfe hath miſreported them. For firſt, where a *Biſhop* (as was then for the moſt part vſed, but now by long preſcription worne out, which preſcription [2] is alſo of validitie and force) did in all weighty matters *perſcrutari diligentiùs cauſam coram eccleſiæ Senioribus*: that is, examined thē before his Chapter, or ſo many of them as would be preſent; this he peruerteth thus: *cauſa perſcrutanda ab eccleſiæ Senioribus*: as if from the *Canon* law he could hammer vs out the *Lay elderſhips*, that be dreamed of; and could make them in euery pariſh the *Iudges* of that which was onely done by *Biſhops*, *coràm*, in the preſence of the *Præbendaries* of the *Cathedrall* Church, but not by them. Secondly, whereas only in proceeding againſt a *Prelate* it is required, that the *exceſſe be grieuous*; this he doth make generall and indifferent to all *enquiries* againſt any whomſoeuer. Thirdly, he hath forged of his owne head beſides the text there, *that to the entent of degradation, a Iudge eccleſiaſticall may not proceed by way of Inquiſition, but by accuſation onely.*

[1] c. qualiter & quando. el. 2. de accuſat. c. ad abolendam. & c. excommunicamus. § Qui autem. de hæreticis. c. cum contumacia. de hæreticis. in 6.

[2] Panor. d. c. Qualiter.

And

And for ſpecification of ſuch contrarieties as he ſurmiſeth to be in *biſhops* proceedings againſt thoſe alleged *Canons*, he firſt ſayth; that *their oath is not abiurationis* or *purgationis*. It is true, that beſides theſe two, ſome oathes which they miniſter, are *veritatis dicendæ*, vpon the crime *enquired* of. Which oath one of his owne *Canons* by him quoted, might haue taught him, if he had read it ouer. *viz.* [1] *Coram Inquiſitoribus iurantes, tam de ſe, quàm de aliis, ſuper facto hæreſis dicere veritatem.* If then in *hereſie*, much more in other crimes. And in truth there is not one word in any of thoſe *Canons* tending to reſtreine al othes vnto *abiuration* & *purgation* alone; as to any that liſt peruſe them, wil be manifeſt.

[1] c. accuſatus. §. licet verò. de hæret. in 6.

The next contrarietie vnto them he aſſigneth, [2] for that *Ordinaries and Commiſſioners eccleſiaſticall deale by way of Enquiry in other matters then hereſie.* Heerein hee childiſhly miſtaketh his booke; and yet will he be dealing in matters, wherein he ſeemeth to me, to haue no inſight at all, howſoeuer (perhaps) he do flatter himſelfe otherwiſe. For no *Canons* doe forbid *Ordinaries* to deale in any matters *criminall*, being of eccleſiaſticall coniſance; nor any others in cauſes duely committed vnto them; whether they deale by the one courſe of proceeding, or by the other. But *Inquiſitours for hereſie*, hauing that matter onely *delegated* vnto them by their *Commiſſion*, are in deed there forbidden; that by colour thereof, they ſhould not reach out their authoritie, vnto matters no way touching the crime of *hereſie*. So that the prohibition there, is for matters that are out of their *Commiſſion*; and not for any maner of proceeding. For they may not deale in matters, that are not *committed* to them, any more vpon *Accuſation*, then they may do by way of *Enquirie*.

[2] c. accuſatus. de hæret. in 6. Clem. 1. de hæreticis.

The third contrariety ſurmiſed by him to be in *Biſhops* proceedings againſt the *Canons* [3] is; that they ſuffer not *publication* to be made of the witneſſes depoſitions: which is a meere ſlander, without any colour of truth. Neuertheleſſe, when by *publication* of the witneſſes names that haue depoſed in matter of *hereſie*, great perill might grow vnto them through the friends of the impeached, or otherwiſe: in that caſe only the *Canons* (with certeine moderation and cautions) do permit (vpon the Iudges diſcretion) the names of the witneſſes to be ſuppreſſed from the defendant, and to be kept from being publiſhed abroad at all.

[3] c. ſtatuta. de hæret. in 6.

Thus much concerning obiections made by the *Treatiſer* & *Note-gatherer* out of the *Ciuill* and *Canon* lawes, againſt all proceeding *of Offfce* with offenders.

CHAP. XV.

Enquiry and proceeding of Office, without an accuſer, and grounded vpon ſome other of the meanes (afore) prooued ſufficient to enter into ſuch enquiry, is approoued by ſundry examples of Scripture.

FOr proceding againſt crimes by *enquirie*, and *of Office* ſometimes vpon the *denunciation* of one, ſometimes vpon *fame* or heare-ſay, ſometimes vpon *notoriouſneſſe* of the fact, and ſometimes vpon *a ſuſpicion* onely conceiued: but ſtill without *partie* to *accuſe* and proſecute; we finde diuers not obſcure traces in the *Scripture* it ſelfe.

1 Gene.38.V.24.& 25. Vnder the law of nature, when [1] one tolde *Iudah* prince or head of his familie (and therefore a magiſtrate) that *Thamar* his daughter in law in her widowhood was begot with childe, at that mans onely *relation* without further *accuſation*, and vpon the *notorious euidence* of the fact, *of Office* he gaue ſentence that ſhe ſhould be burned.

2 Gen.44.V.5, 6,7,8,9,& 10. When *Ioſeph* [2] had cauſed his ſiluer cup to be put in *Beniamins* ſacke, & had ſent his ſteward to ſearch them all, who alſo charged them with this theft, and vpon pretended *ſuſpicion* only, did enter to an *enquirie*, and to make further ſearch: yet there was none of them that appealed to the law of nations, as if they were vniuſtly dealt with, hauing none *accuſer*, but ioyned iſſue with him, and flatly denied the matter.

3 Num.5.V.12. & deince. In the trial of [3] ielouſy vpon the only *ſuſpicion* of the husband, (though ſomthing be extraordinary therein and *ceremoniall*) yet by that *enquiry* of the Prieſts (to the apparant great perill of the woman if ſhe were faultie) we may note this part of iuſtice in courſe of that iudgement: *viz.* that there is none *accuſer* or party, that pretendes he can or will prooue it. For of the husband (who findes himſelfe grieued, and therfore onely *denounceth* her to the *Prieſt*) it is ſaid, this enquirie ſhall be made, becauſe [4] *the ſpirit of ielouſie is vpon him.* It is alſo there ſaid to be done, when [5] *the ſinne is ſecret*, and the husband knoweth it not, but only ſuſpecteth

4 Verſ.14.

5 Verſ.13.

ſpecteth it: *& when there is no witnes againſt her, nor ſhe taken in the maner:* and therfore ſuch, as it may not be intended the husband becomes the accuſer, pretending to make proofe of the very fact: yet neuertheles it is teſtified there, that for bringing her to ſo dangerous an *enquiry* & trial, *the*[1] *huſband ſhall be free from ſinne.* [1] Ibid. V. 31.

If a man bee *entiſed ſecretly* to *Idolatrie*, by him or her that is deareſt and neareſt vnto him; God commandeth thus in this caſe: [2] *Thou ſhalt not conſent vnto him, nor heare him, neither ſhall thine eye pitie him, nor ſhew mercy, nor keepe him ſecret: but thou ſhalt euen kill him, thine hand ſhall bee firſt vpon him to put him to death, and then the hands of all the people, and thou ſhalt ſtone him with ſtones that he die.* In that it is here ſayd, *Thou ſhalt not keepe him ſecret, & that the hands of all the people muſt be vpon him*, it appeareth ỳ the iudgement muſt be *publike*, & not done by priuate authoritie alone: *for*[3] *euery one that (by vſurpatiõ) taketh the ſword, ſhall periſh with the ſword.* Then, if this iudgement muſt be *publike*; where is there any *Accuſer?* for he that reueileth and *denounceth* it, is a witneſſe; in that *his hand muſt be vpon him*, according to that other part of the law, viz. *The*[4] *hands of the witneſſes ſhalbe firſt vpõ him to kill him, and afterwards the hands of all the people.* Nay, how can ſuch an entiſer poſſibly be condemned, except it be vpon his owne *examination*; and ſo by courſe of *enquirie*, ſeeing [5] *one witneſſe ſhall not teſtifie againſt a perſon, to cauſe him to die?* ſo that here we haue in Gods owne law a iudiciall courſe, in a capital matter *and ſecret*, inſtituted vpon one priuate mans *denunciation:* who is ſo farre from being an *Accuſer* properly taken, that he is a *witnes:* and the ſinne to be found out by courſe of *enquirie* vpon the parties owne *examination*; in ſo much as there can bee (in this caſe) none other way of conuiction.

[2] Deut. 13. V. 6, 7, 8, 9, 10.

[3] Mat. 26. V. 52.

[4] Deut. 17. V. 7.

[5] Nomb. 35. V. 30. Deut. 17. V. 6.

Likewiſe in the ſame chapter, it is preſcribed thus: that [6] *if thou ſhalt heare ſay (concerning any of the cities, which the Lord thy God hath giuen thee to dwel in) wicked men are gone out from among you, and haue drawen away the inhabitants of their citie, ſaying, Let vs go and ſerue other gods, which ye haue not knowen: then thou ſhalt ſeeke and make ſearch, and enquire diligently: and if it be true & the thing certaine, &c. thou ſhalt euen ſlay the inhabitants of that citie with the edge of the ſword: deſtroy it vtterly and all that is therein, & the cattell thereof with the edge of the ſword:* where we plainly find, *dili-*

[6] Deut. 13. V. 12, 13, 14, 15.

gent enquirie vpon *beare-say* and *fame* commanded, and proſecuted *of office* euen vnto condemnation and execution; without any mention of *Accuſer* or proſecuter of the cauſe.

In the ſame booke afterwards, and for the crime of idolatrie likewiſe, it is thus appointed: [1] *If it be told vnto thee, and thou haſt heard it, then thou ſhalt enquire diligently: and if it bee true and the thing certaine, that ſuch abomination is wrought in Iſrael; then ſhalt thou bring foorth that man, &c. and ſhalt ſtone him with ſtones till hee die.* So that here alſo we haue a *fame*, or perhaps but the *denunciation* of one man, whereupō the magiſtrates *enquirie* is grounded; and vpon the *enquirie* the magiſtrates ſentence (finding the matter *true* and *certaine*) & the *execution* of the iudgement; all without *Accuſer* or proſecuter.

[1] Deut.17.V.4,5

For grounding proceeding *criminall* without *accuſation*, vpon the *notoriouſneſſe* of the fact; we haue a courſe preſcribed in theſe words: *If a man be found lying with a woman maried to a mā, then both twaine ſhall die.* And [3] againe, *If a man find a maid that is not betrothed, and take her and lie with her, and they be found, then ſhall he giue, &c.* therefore vpon *taking in the maner*, proceeding vnto *condemnation* and *execution* is warranted, though there bee none *Accuſer*, but onely the *witneſſes*, that depoſe it.

[2] Deut.22.V.22.

[3] Ibid, V.28.

So the [4] *Gibeonites* for their *apparant* guilefull dealing, falling out by their owne confeſſion vpon *examination*; were condemned by *Ioſhua* vnto perpetuall ſlauerie, without any *Accuſation*.

[4] Ioſu.9.V.22, 23.

When the [5] children of *Iſrael* heard ſay that *Reuben*, *Gad*, and the halfe tribe of *Manaſſeh* had built an altar contrarie to Gods word, as they at firſt conceiued it: they purpoſed to warre vpon them; yet thought good to delegate tenne princes vnto them firſt, to take their anſwere and excuſe. So that vpon the *fame* brought vnto the men of *Iſrael* (without any ſet *Accuſers*) they entred into further *Inquiſition* & *examination* of this matter.

[5] Ioſu.22.V.11. &c.

The [6] prophet *Eliſha* had the ſinne of *Gehazi* his ſeruant diuinely reueiled vnto him; and was authorized by God to condemne him, & to puniſh him for it: yet ſought he none other to *accuſe* his ſeruant, & to obiect that crime vnto him, beſides himſelfe, that was to iudge him. Vpon ỹ only outcry [7] of the multitude againſt *Paul*, the chiefe captain (not ignorant of the law of the *Romanes*) brought

[6] 2.Reg 5.

[7] Act.22.& 23.

brought him before the great *Councell* of the *Iewes*, without any particular *Accuſer* or *Proſecutour* there mentioned: notwithſtanding that generall Outcrie be [1] termed an *Accuſing* in that place, but not properly.

[1] Acts. 22. V. 30. & 23. V. 6.

Furthermore, at the only [2] *denunciation* of an husband, that he found not his wife a Virgin, ſhe is put to her clearing before the *Iudges*. Wherein if ſhe cleare her ſelfe, then without her further mediation (the *Denouncer*) her husband is to be chaſtiſed by the *Elders*, and condemned in a *fine* to the father of the woman for his calumniation, and vniuſt bringing her name into queſtion, and life into danger. But if ſhe be not found a mayd, ſhe is to be put to death: ſo that the one of theſe ſentences, muſt needes be of the *Iudges office* alone. For if the husband be the *Accuſer* of the woman, then muſt the condemnation of him be *ex Officio*; becauſe his owne complaint reacheth no further, but to his wiues condemnation or clearing. But if the womans father be ſaide in this proceſſe to hee the *Accuſer* of the husband, then is the wiues condemnation done *ex Officio*. So wee finde that *Daniel* [3] proceeded without any other partie againſt the wicked Elders *ex mero Officio*. For hee was both *Iudge*, *examiner*, and *Accuſer*.

[2] Deut. c. 22. V. 14. &c.

[3] Dan. 13. V. 51. & ſic deinceps.

By the [4] *parable* of the waſtfull Stewarde we are taught, that vpon credible reports onely, we may enter into *examination* and *enquiry* of the miſdemeanour of ſuch, as be vnder our authoritie. *How is it* (ſaith the rich man there to his Stewarde) *that I heare this of thee? gine an account of thy Stewardſhippe*. And he looked for none other to *Accuſe*, then himſelfe that was to iudge.

[4] Luke 16. V. 2.

When by diuine reuelation the hidden and cloſe hypocriſie of *Ananias* and *Saphira* [5] was made knowen vnto *Saint Peter*; and that by *ſpeciall œconomie*, he was *publikely* to proceede to their *examination* and *condemnation* vnto death; hee ſought none other *Accuſer*, but himſelfe obiected, and by his owne *Apoſtolicall* authoritie, proceeded alſo to ſentence againſt them for that ſinne.

[5] Acts. 5. V. 3. &c.

And if that be truely which is commonly ſaid, *humana iuſtitia imitatur diuinam:* why ſhould not this courſe of proceeding be diuine and godly? for *God* doth as it were make *Enquirie* vpon a crie of ſinne comming into his eares; and afterward puniſheth

[1] Gen.11.V.5. [2] Gen.18.V.20.&21. [3] 1.Cor.cap.5.V.1.&c. [4] Nom.35.V.30 [5] Deut.25.V.1,2,3. [6] Act.19.V.38.

ſheth without any *accuſer*. *The Lord*[1] *came downe to ſee the Citie and tower of Babel, which the ſonnes of men builded*. And[2] againe afterward touching *Sodome, the Lord ſayd, becauſe the crie of Sodome & Gomorrah is great, & becauſe their ſinne is exceeding grieuous, I wil go downe now & ſee, whether they haue done altogether according to that cry which is come vnto me, & if not, that I may know.* S. *Paul* vpon the credible[3] fame and heareſay, touching the inceſtuous *Corinthian*, without any *accuſer* or partie to ſollicite him thereto, *determined and adiudged hee ſhould bee committed to Satan*. For it is thus ſayd in that place, *it is heard certainly that there is fornication among you, &c.* It is thus written in the booke of *Nombers*: [4] *Whoſoeuer killeth any perſon, the Iudge ſhall ſlay the murderer through witneſſes.* Where we ſee this duetie and office required at the *Iudges hand* (ſo there bee proofe made of the crime, by two *witneſſes* at leaſt) and that indiſtinctlie and ſimplie; without any mention of *Accuſing* or proſecuting by any third perſon.

Nay, to ſay that which the trueth is; it is ſo farre off, that (by Scripture) an *Accuſer* ſhould be required in all *criminall* proceedings: that as yet (for my part) I haue not found many places, where it is ſo much as mentioned to haue bene vſed, at leaſt as *Accuſation* is properly taken. One I read of in the lawe of God, viz. [5] *Where there ſhalbe ſtrife betweene men, and they ſhall come vnto iudgement, and ſentence ſhalbe giuen vpon them, and the righteous ſhalbe iuſtified, and the wicked condemned: then if ſo be the wicked be woorthy to be beaten, the Iudge ſhall cauſe him to lie downe, and to bee beaten before his face, &c.*

In the *Acts* of the *Apoſtles*, in the ſpeach of the *Recorder* or town-clerke of *Epheſus*, the courſe of *Accuſatiõ* is in theſe words mentioned. *If*[6] *Demetrius* (ſaieth hee) *and the craftſ-men which are with him, haue a matter againſt any man, the law is open, & there are deputies, let them accuſe one another*. And it was practiſed afterwards againſt *Paul*, as appeareth by the ſeuerall places of the *Acts*, handled in the next chapter of this treatiſe.

But albeit *Accuſing* and *Accuſers* be elſe-where alſo ſundrie times mentioned, yet vpon particular diſcuſſing and view of the places it will appeare; that none other *Accuſer* be thereby meant, but *witneſſes* onely: who in a large ſignification, ſome-

sometimes are vnproperly termed *Accusers*, as I haue afore shewed. When the wicked high *Priestes, Scribes*, & other *Elders* of the great Council of that nation, proceeded against our *Sauiour Christ*, whom they knew and perceiued (by the mouing of all *Ierusalem* at his triumphant receiuing thither) to be in great reputation with most of the people: it is no doubte, but they kept in outward apparence a colour of a due and *Iudiciall* course of proceeding with him, were it but for feare onely. Let vs see then, whether they retained *Accusation* as the onely lawfull course.

It is true, [1] three of the *Euangelists* doe report, that the chiefe *Priests and Elders accused him before Pilate*: and [2] as one of them saith, *of many things*: & as [3] another of them saith, *they accused him before Herod vehemently*. Yet whoso will attentiuely way and consider of that historie, shal well perceiue, that our *Sauiour* was condemned (afore) by the *Eldership*, and that these imputations of crimes against him before *Pilate* and *Herode* (called there *Accusing*) was nothing else, but to approoue vnto them the iustice of the *sentence* formerly giuen by the *Sanedrin* or great Councill vpon him: to the intent that they might obteine a *decree* for his *executing*, at *Pilates*, or at *Herodes* handes. For albeit the Iewes (after they were conquered by *Pompeius Magnus*) had *diuersion* their owne lawes, ordinances, and ceremonies left vnto them: yet had they not *ius gladij*, the power of life and death in them: and so they signifie vnto *Pilate*, when he was willing to haue shaken them off, and to haue had no dealing at all in that action. For when he saide, [4] *take ye him, and iudge him after your owne lawe: then the Iewes saide vnto him, It is not lawfull for vs to put any man to death.* And *Pilates decree* was nothing else; but that *it should be* [5] *as they required*. What that was, two other *Euangelistes* doe expresse, viz. that he might be [6] *deliuered vnto them to be crucified*. Lo whereunto his *decree* tended, vnto *Christs* execution, but not to *condemnation*; for he had afore *washed his handes*, and pronounced *Iesus* innocent.

[1] Mat. 27. V. 12. Luke 23. V. 2.
[2] Mark. 15. V. 3.
[3] Luk. 23. V. 10.
[4] Ioh. 19. V. 31.
[5] Luk. 23. V. 24.
[6] Mat. 27. V. 23. Iohn 19. V. 16.

For proofe that he was first *condemned* by the *Eldership*, and then *execution* only sought for, by *Pilates* authoritie: it appeareth in the 26. chapter of [7] *S. Matthew* thus; *behold, now ye haue heard his blasphemie: what thinke ye? they answered and said, he is worthie to die.* And this *Councel* was holden ouer night, immediatly after

[7] Vers. 65. 66.

his apprehenſion. This action *Saint Marke* ſheweth plainely to
[1] Mar.14.V.64. haue bin his *condemnation*. They [1] *all condemned him* (ſaith he) *to*
[2] Mat.27.V.1.2 *be worthy of death*. Thus hauing *condemned* him, *when* [2] *the morning was come, they helde a Councill againe, to put him to death; and thereupon ledde him bounde to Pilate the gouernour*, to procure a decree for his *execution*. For in the next verſe after, it is directly
[3] Ibid.V.3. ſaid [3] thus: *then when Iudas &c. ſawe that he was condemned, he repented himſelfe &c.* which was afore his appearance before *Pilate*, and afore he had dealt with him at all.

What then was the courſe whereby the great *Coũcill* proceeded with him? not by *Accuſation* made by any other then themſelues: but *vpon witneſſes* (though falſe, & by them ſuborned) and
[4] Mat.26.V.59, 60. vpon pretence of his owne *cõfeſſion*. [4] *They ſought falſe witneſſes* &c. *at the laſt came two falſe witneſſes* &c. & a litle after, *what* [5] *haue we more neede of witneſſes? behold now ye haue heard his blaſphemie.*
[5] Ibid.V.65.
[6] Luk.22.V.vlt. And *S. Luke* [6] *thus: then ſaid they, what neede we any further witneſſes? for we haue heard it of his owne mouth.* Whereby it is made manifeſt, that albeit the *Prieſtes* and other *Elders*, ſought by all meanes poſſible (outwardly) to approue their proceeding againſt *Chriſt* vnto *Pilate* and the people: yet did they neuer ſeeke or require any third perſon, to preferre vp *Accuſation* againſt him: and therefore a courſe of proceeding not of neceſſity to be obſerued by Gods law, as they al then conceiued & vnderſtood it. Likewiſe when the firſt martyr *S. Steuen* was proceeded with by the ſame *Councill* & *Elderſhip* reſiding at *Ieruſalem*, none
[7] Act.6.V.11.13 *accuſer*, but [7] *witneſſes* only were vſed For though the *Libertines* & *Cyreniãs* (vpõ ſpite toward *Steuẽ*) did ſuborne the *witneſſes*, yet did they not appeare themſelues openly in the action, as *Accuſers*.
[8] Ibid.V.15. Neuertheleſſe it bare the ſhew at firſt of a [8] due and *Iudicial* proceeding in *Councill*, howſoeuer the *execution* of him after was
[9] Act.7.V.57, 58,59. done without iudgement giuen, and [9] by tumult of the people.

Nowe leaſt any man ſhould ſurmiſe, that this was but a corrupt cuſtome crept into thoſe later times; we will therfore looke ſomething higher, what was done in former ages.

In the proceeding againſt *Naboth*, though it was a moſt wicked iudgement, grounded vpon *periury* and *ſubornation*, yet we
[10] 1.Reg.cap.21. V.9,10,11,12, 13. may [10] ſee, the plot was ſo laid, as it might ſeeme to cary a pretẽce of a due *Iudiciall* courſe; whereupon may be truely gathered

ſomething

ſomething touching the maner of proceeding then vſed. For in a ſolemne faſt, when *Naboth* ſate *Iudicially* with the reſt of the *Elders*, and chiefe of the people; vpon the onely witneſſing of two wicked men in his preſence (that he blaſphemed God and the king) *Naboth* was condemned to be ſtoned.

The matter for which I note it, is this: that the proceſſe was without any *Accuſer* or party. For there are named onely the *witneſſes, the elders, and gouernours, & Naboth the party condemned.*

By which, (together with the hiſtorie of the adultereſſe [1] mentioned in the Goſpel, being conferred with [2] *Deuteronomie*) I do gather; that oftentimes, in their *Iudiciall* proceedings, the *Iewes* had none other perſons that any way dealt, but *witneſſes, Iudges*, and the *party* againſt whom they proceeded. For in the Goſpel, albeit thoſe that told *Chriſt* of the womans adultery, are [3] called *Accuſers* in theſe wordes, *Where be thoſe thine accuſers?* yet ſuch of [4] them as *were without ſinne, were willed by him, to caſt the firſt ſtone at her:* Alluding therein to that lawe, [5] that *the hands of the witneſſes ſhalbe firſt vpon an offendour condemned, to kill him.* So that there were none other *Accuſers*, but the witneſſes.

[1] Ioh.8.cap.10.
[2] Deut.17.
[3] Ioh.8.V.10.
[4] Verſe 7.
[5] Deut.17.V.7.

This is more plainely proued out of the ſame booke [6] afterwardes. For where it is ſaide, that *one witneſſe ſhall not riſe againſt a man for any treſpaſſe, or for any ſinne, or for any fault that he offendeth in, but in the mouth of two or three witneſſes ſhall the matter be eſtabliſhed:* it is foorthwith added thus: *If a falſe witneſſe riſe vp againſt a man to accuſe him of treſpaſſe: then both the men which ſtriue together ſhall ſtand before the Lord, euen before the Prieſts and the Iudges, which ſhall be in thoſe dayes, and the Iudges ſhall make diligent inquiſition: and if the witneſſe be found falſe, and hath giuen falſe witneſſe againſt his brother, then ſhall ye doe vnto him, as he had thought to doe vnto his brother.* Whereby may appeare that he that is ſaid to *accuſe*, is termed a *witneſſe* three times, and his falſehood is to be found out by the *Iudges inquiſition.* This alſo appeareth more plainely by the ſtory [7] of *Suſanna*, where the *Elders* were witneſſes, and there were none other *Accuſers.*

[6] Deut.ca.19. V.15,16,17, 18,19.
[7] Dan.13.V.34, 40,& 62.

So in the [8] condemnation of a *diſobedient ſonne*, there is none other *Accuſer*, but the very parents that make the *complaint*, and beare witneſſe alſo.

[8] Deu.cap.21. V.18,19,&c.

So that we finde in Scripture, proceedings *of office*, grounded

vpon *Denunciation* of one perſon, vpon heare-ſay, vpon ſuſpicion, and vpon *Notorietie* of the fact, aſwell by *Iudges Ciuill* or *Temporall*, adiudging vnto a temporall puniſhment, & by Iudges being both *Ciuill* and *Eccleſiaſticall*, and by *eccleſiaſticall* alone, inflicting the like penalty: as alſo by *eccleſiaſticall Iudges*, proceeding to cenſures *eccleſiaſticall*, without any *accuſation* or partie to proſecute, other then the *Iudges* themſelues. And therefore criminal proceeding *of office*, (& conſequently without *Accuſer*) and likewiſe without any *ſolemne preſentment*; is by manifolde examples of Scripture, ſufficiently approued for lawfull & godly.

CHAP. XVI.

An anſwere to ſuch obiections, as out of Scripture or eccleſiaſticall writers, be made againſt criminall proceeding of Office, *by the* Note-gatherer *and others.*

Gainſt this, are obiected two places out of the *Actes of the Apoſtles*. *It is not the* [1] *manner of the Romanes, for fauour to deliuer any man to the death, before that he which is accuſed, haue the accuſers before him, and haue place to defende himſelfe, concerning the crime.* And the [2] other: *I will heare thee when thine accuſers alſo are come.* By which they would gather, that the very Heathens knew it to be contrary to equitie, to proceede againſt a man, otherwiſe then by *Accuſation*.

[1] Act. 25. ℣. 16.

[2] Act. 23. ℣. vlt.

But both receiue one anſwere. In deede the vſuall and moſt *ordinarie* way of proceeding among the *Romanes in veteri Republica*, (before it was reduced to a *Monarchie*) was at the firſt in crimes *capitall* (where the people was *Soueraigne Iudge*) by way of *Accuſation*, as is more largely touched afore. And (next vnto ſeruice in warre,) eloquently to *accuſe* a man before the people, was the readieſt ſteppe, that forward wittes ſought [3] credite and countenance by; being an eſpeciall meane, to beare offices of honour in that Common-wealth. Vpon which occaſion, it was in great credite and vſe; till through ſundry *calumniations* (to bring men wrongfully into perill of attainder,) they were forced per *S. C. Turpilianum*, and other lawes, to lay moſt grieuous penalties and dangers both vpon

[3] Cicero 2. offic. Plutar. in Lucul.

vpon thoſe that did not proue that which they obiected, and therefore were preſumed *calumniari*, or who did *prænaricari*, i. collude, *terginerſari*, wrangle, or deſiſt from proſecuting. So that, being ſo dangerous to the accuſers in many reſpects; it became afterwards, to be leſſe frequented. Yet alwayes both before and after, this they obſerued: that when there was any that woulde be *Accuſer* or *partie* ſeriouſly, without *colluſion*: there the *Iudge* neuer *enquired ex Officio*: for *vbi adeſt remedium ordinarium, ibi ceſſat extraordinarium*, as that was holden then, ſauing in certaine caſes afore by me touched.

But this Crime here obiected againſt *Paul*, was accounted capitall by the *Iewes*, and he had ynow that were his *Accuſers*, ſo that there needed to be none *Enquirie*, *ex officio mero*, againſt him. That he had accuſers who determined to proſecute him, appeareth by theſe places: *The* [1] *Captaine would know the certaintie, wherefore he was accuſed of the Iewes.* Againe, [2] *he was accuſed of queſtions of their Lawe*: and further [3] *Claudius Lyſias* the Colonell, ſignifieth plainely by letter to *Felix* the Gouernour, that he *had commanded his accuſers to ſpeake (before the Gouernour,) the things, that they had againſt Paul.* So that the *Gouernour* not knowing the cauſe, and knowing that the *Accuſers* were commaunded to proſecute before him, had iuſt occaſion to ſay, that he would then heare him, when his *Accuſers* came. And in the next Chapter, *Tertullus* an [4] Orator did accordingly come with others of the Iewes, and *accuſed* him before *Felix*. Likewiſe when he was afterwarde conuented before *Porcius Feſtus*, (the Gouernour that ſucceeded next) *the Iewes* [5] *that came thither from Ieruſalem, layde many and grieuous complaints againſt him.* And after more plainely thus: *againſt whom when the Accuſers ſtood vp, they brought no Crime of ſuch things as I ſuppoſed.*

But to make it plaine euen out of that place, that the *Romanes* beſides the way of *Accuſation* vſed alſo (vpon cauſe) to *enquire of Office*: *Lyſias* the Colonell (by occaſion of the crie and vprore made againſt *Paul*) did without any mans [6] inſtigation, (and therefore *of Office*) *commaund that hee ſhould be ſcourged and examined; that he might knowe, wherefore they cried ſo on him.* Where (by the way) appeareth, not onely that he was then proceeded with *of Office*, but alſo it was meant that hee ſhould be (vpon

1 Acts.22.V.vlt.
2 Acts.23.V.29.
3 Acts.23.V.30.
4 Acts.24.V.2.
5 Acts. 25.V.7. & 18.
6 Acts.22.V.24.

thoſe onely enducements) examined by torture, of matters that might be *Pœnall* to himſelfe. Neither did *Paul* take exception againſt this courſe as vnlawful, nor the Captaine conceiue feare, that he had done more then he could iuſtifie, in any other reſpect but this, becauſe *Paul was a Citizen of Rome*. For they had a law, [1] that a Citizen might not be beaten with roddes, nor tortured any way, but by *decree* of the people. And yet any other of their ſubiects might be, and were often ſo vſed.

[1] Duodecim Tab.

It is notorious to them that haue read any thing almoſt, of the ſtate of that *Common-wealth*, that the *Dictators* (who for their halfe yeere had a *Soueraigne* authoritie) did *enquire* and puniſh euen *capitally*, *ex Officio*, as they in diſcretion thought meete.

The *Cenſors* of maners had and practiſed for their fiue yeeres ſpace, the *Enquirie* and puniſhment *ex Officio*, of ſundry miſdemeanors and diſſolute courſes of life; not *capitally*, but either by *depoſing* men from their offices and degrees, by *noting them with infamie*, by *corporal puniſhments* of the lighter ſort, or by *fine*, or by all theſe.

But the *Note-gatherer* maketh alſo moe quotations out of the ancient fathers; which becauſe they mention not an *othe* at all, I doe therefore referre them to this place; as brought by him to prooue, that no proceeding *Criminall*, may be vpon the *Iudges Office* alone.

Firſt, none of the places quoted out of *Origen* haue any reſemblance of this matter. That which he quoteth out of *S. Ambroſe* [2] in reſpect of ſome difficultie, doth require to be plainly opened. *Syagrius* biſhop of *Verona* had called afore him one *Indicia*, *ſanctificata benedictione*, a profeſſed Virgin (as I take it) vpon queſtion of her incontinencie. There was none *Accuſer* that tooke vpon him to proue it; neither was any *Fame* riſen thereof; but *inuidia conflata ipſi*, ſhe was depraued by light perſons, by hereticks, and infamous men, and that by wicked practiſes, through briberie and intemperancie: yea by ſome ſuch as had bene (afore) put out of her houſe, for actions farre vnſeeming that, which they outwardly profeſſed. But it was alledged in iuſtification of the ſaide *Biſhops* proceeding with her, that *a rumour* had bene ſpread, that the ſaide *Indicia* had borne a childe, which ſhe had made away. And that this *rumour* was ſo ſpread by certaine

[2] Ambr. li. 8. epiſt. 64.

women

women (though but baſe) that ranne vnto the *Monaſterie*, and there firſt bruited it, from whence it came abroade among the people, and ſo to the eares of one *Maximus*. Howbeit, theſe which were ſaid to be the firſt authors of that *rumour*, were conueyed out of the way. Now *Syagrius* the *Biſhop* there, hearing of ſuch a *rumour*, and thereupon proceeding againſt the ſaide *Indicia*, did decree, that ſhe ſhould be inſpected by Midwiues, for the clearing and proofe of her Virginitie. Which (as he alledged) he did the rather; becauſe certaine (taking ſcandal hereat) did affirme; that if ſhe ſhould be tolerated without ſuch *inſpection*, they would not communicate any more with their *Biſhop*. But *S. Ambroſe* there taxeth them thus: *Quales illi, qui volunt præſcribere Sacerdotibus, quid ſequi debeamus? What kinde of perſons be theſe, that will preſume to preſcribe vnto vs Biſhops, what we haue to doe?* And albeit the ſaid *Maximus* was (in very trueth) the *Relatour*[1] thereof to the *Biſhop*; yet was there none *Accuſer* in proper termes of Lawe ſo to be called, nor any that did *iudicially denounce* her thereof, *Quam nullus argueret, nullus deferret.*

1 Sermone ſuo accuſationem detulit: aures tuas impleuit clamore: teſtes auditionis deduxit: cognitionem poposcit.

Now becauſe a woman of her qualitie, in ſo diſorderly ſort, vpon no better grounds of inducement, was adiudged to ſo vncomely a courſe of clearing her Virginitie; and of ſo great vncertaintie, beſides the danger, that the Midwiues might be ſuborned: Therefore *S. Ambroſe* (being *Archbiſhop* of *Millaine*, in whoſe Prouince *Verona* ſtoode) did auocate this cauſe from the *Biſhop* vnto his owne *audience*. He therefore hearing it *Iudicially*, in the preſence of his brethren and fellowe *Biſhops* (to whom he imparted it:) beſides the former defects, did finde vpon examining of the matter, that *Renatus* and *Leontius* two witneſſes produced vpon the *Fame*, which it was entended they had heard (though they were ſuborned) yet did they materially varie one from the other, in the ground of the cauſe. It fell out likewiſe by proofe, that they two had ſent out of the way, *Mercurius* and *Lea*; two other ſuppoſed witneſſes, and but lewde perſons. Alſo that another pretended witneſſe, called *Theudule* was runne away, knowing that it would be obiected in way of exception againſt her; how ſhe had lien at the ſaide *Renatus* his beds feete. Beſides, another woman had alſo confeſſed, that the ſaid *Renatus* did commit fornication with her.

Now

Now becauſe hereupon, no ſiniſter or bad *fame* againſt *Indicia* was in Lawe ſufficiently proued; but rather to the contrary a good *fame* was proued by one *Paterna*, and by the nurſe of *Indicia:* therefore *S. Ambroſe* abſolued and diſmiſſed her from ſuch *inſpection*, reſtoring her to her former good name, but cõdemning *Maximus*, and excommunicating *Renatus* and *Leontius* for their indirect, vniuſt, and *calumnious* dealings. Yet did he not (as he ſaith) ſimply cõdemne that kinde of *purgation* and proofe of Virginitie, by *inſpection*. For he ſaith thus: *Quid ergo? Negamus inſpiciendas virgines interim, quòd nuſquam legerim? Non adſtruo, nec verum arbitror.*

In which Proceſſe, many pointes may be noted, to auoche the Iuriſdiction of *Archbiſhops* and *Biſhops*, and ſundrie their proceedings *Eccleſiaſticall* at this day: but I finde no footeſteps or colour of any miſlike. If theſe wordes of hís, be alledged to proue, that no *Criminall* Proceſſe ſhould be made without an *Accuſer* properly ſo called: viz. *It is requiſite, that the witneſſes be voyd of partialitie; yet ſo that there firſt appeare an Accuſour*; this very Epiſtle will ſhewe, that ſuch *Accuſour* (though then they were more vſuall) is not neceſſarily alwayes to be required. For he findeth fault, that ſhe was conuented, although there would appeare, *neque author criminationis, neque accuſator, neque profeſſor delationis*; *Maximus* (in trueth) being vnder-hand both a *Relatour*, and a kinde of *Proſecutour*. So that (no *Fame* being thereof) if any one would but haue ſhewed himſelfe as a *Relatour*, or a *Denounceour*; it might haue ſufficed, though he were not a very *Accuſour*, *Qui delationis ſe nexu obligabat*; as *S. Ambroſe* there ſpeaketh of the *Inſcription* required (by Lawe) *ad pœnam Talionis*, for him, which ſhould faile in proofe. And in trueth, if *Enquire of office* were not lawfull, and none *Accuſour* were to be receiued, but as Lawe and olde *Canons* appoint; aſſuredly there would be fewe or no Crimes at all in any Court euer proſecuted. So great is the trouble and danger.

Beſides if the want of an *Accuſour*, had bene ſufficient to haue reuerſed *Syagrius* his ſentence, and to haue quaſhed the whole Proceſſe: then what needed *S. Ambroſe* ſo carefully to haue examined her *Fame* good or bad, by ſo many witneſſes? But that he knew (if an euill *Fame* had bene proued) the *Iudge* might by

Lawe

Lawe haue proceeded as he did, without any either *Accuſour* or *Denunceour*.

So that we ſee, he thought it meete, and by Lawe required at his handes, for her clearing and abſoluing, to make *Enquirie* of the *Fame*; albeit eche of thoſe were wanting. And therefore he did *of meere Office* by way of *Enquirie*, proceede to the final ſentencing of that cauſe. In like ſort was that his condemnation of *Maximus*, *Renatus*, and *Leontius*, done of his *meere Office*, without ſomuch as proſecution by any other man.

Furthermore to ſhewe, that hee required not of neceſſitie an *Accuſour* in euery *Criminall* cauſe; he maketh there a plaine ſeuerance betweene the *Ciuill* Lawes (as in that behalfe they were then moſt practiſed) from the Lawes *Eccleſiaſticall*, euen at that time. For (ſaith he) *Si leges publicas interrogemus, accuſatorem exigunt: Si Eccleſia, duobus* (inquit) *aut tribus teſtibus ſtat omne verbum.* Then where witneſſes might bee had to prooue the matter, there was not in an *Eccleſiaſticall* cauſe (no not in *Saint Ambroſes* time) any *Accuſour* neceſſarilie required, beſides the *Iudges Office*.

In the 136. Epiſtle of *S. Auguſtine* by him alſo quoted, there is nothing ſounding that way. Hee there onely ſheweth, that *Bonifacius* a Prieſt, was not detected before him of any Crime, and that he had not commaunded his name to be razed out of the number of Prieſts.

In the next Epiſtle is contained, that the ſaide *Bonifacius* being of *S. Auguſtines* houſeholde, and perceiuing the lewde inclination of another in that houſe, would neither agree vnto it, nor yet conceile it. The other being complained of by him to *S. Auguſtine* their *Beſhoppe*, did replie; that *Bonifacius*, ſeeing hee could not (as he would) abuſe his chaſtitie, did ſeeke (of ſpite) in that ſort to touche his good name. Touching this reciprocall Crimination of one of them againſt the other, *S. Auguſtine* [1] ſaith thus: *When this matter had long troubled mee* (ſaith he) *finding no meane, whereby the one of the two might be conuinced (albeit I beleeued the Prieſt better) I thought at firſt to leaue them both to God, vntill ſome ſuch iuſt and plaine cauſe might appeare in th'one of them (whom in deede I greatly held ſuſpected) whereby I might turne him out of mine houſe. But afterwards calling to minde, that at the*

[1] Auguſt. Epiſt. 137.

Sepulchers of ſome Martyrs, it pleaſed God ſometimes to worke myraculouſly; I willed them both to goe to the place where the Martyr Fœlix of Nola *was buried; becauſe from thence whatſoeuer ſhould happen from God to be reueiled vpon either of them, might moſt eaſily and faithfully be ſignified vnto me by writing.* Can any thing hereof be gathered againſt *Criminall* Proceſſe made *of Office?* Why? It mentioneth neither the one courſe, nor the other.

But perhaps it will be ſaide, that *S. Auguſtine* put neither of them to a *Corporall othe.* Therein he did moſt orderly and according to Lawe. For no Lawe would permit it in this caſe, the Crime being not manifeſted abroade by any *Fame* &c. And the Criminations being mutual, eche of them being *Denounced* and charged by the other to be Criminous. But for treating of ſuch othes, this is not the peculiar place.

Another of his places quoted out of *S. Auguſtine*, I cannot coniecture why hee bringeth; except hee meant to alledge it againſt *Accuſation*, becauſe ſpeaking to a *Donatiſt* of a *Donatiſt*, [1] he ſaith thus: *Emeritum certè non decet defendere Optatum, ſed fortaſſe nec accuſare.*

[1] Auguſt. Ep. 164.

By the quotation out of [2] *Gregorius Magnus*, writing to *Maximus* (that had entred into the *Biſhopricke* of *Salona*, and was *accuſed* of *Simony*) I thinke he meant theſe wordes, if any: *Seeing* (ſaith he) *the charge of making proofes is not layde vpon thee, but vpon him that accuſeth; ſee thou repaire vnto vs without delay: and then there ſhall either an Accuſer be readie, which ſhall duely proone that which is obiected touching Simoniacall hereſie and other matters: or elſe ſome other wholeſome & due courſe (as the exigence of the cauſe doth require) ſhalbe taken, &c.* What? Becauſe the *Accuſer* muſt proue (where that courſe is purſued) doth it therefore follow, that none other maner of proceeding is lawfull? Nay rather this place (though ſomewhat obſcurely) inſinuateth that though the *Accuſer* come not at all; yet the fault ſhall not be wincked at, orleft vndealt with. By the way, let me note vnto you out of this place; that *Gregorie* did in the meane time ſuſpend the ſaid *Biſhop* from celebration of the *Sacrament*; till triall of his matter might be had.

[2] Greg. Ep. ex Regiſt. li. 5. ca. 125.

In the place which he quoteth out of *Theodoret*, concerning proceeding of *Biſhops*, no matter ſounding any thing that way, can

can I finde. *S. Baſil* in the place [1] by him quoted, complayning of the iniurious perſecutions then vſed againſt *Chriſtian Biſhops*, ſaith thus: *Whereas no wicked man is cõdemned ſine certis indicijs, without certaine Euidence; yet Biſhops are condemned by meere calumnies.* And a litle after he ſaith thus: *Some know not their Accuſers, nor haue at any time appeared in the Iudiciall place, nor haue bene complained of at all: and yet being taken away at midnight, haue bene ſtraight-way driuen into baniſhment.* Who denieth, when the proceeding is by *Accuſation*, but that the defendant ſhould know his *Accuſer*, that hee may be allowed his iuſt exceptions? But what is this to proue, that no courſe is lawfull, beſides *Accuſation?* And the fault is not alone aſſigned hereupon; but alſo becauſe they were *baniſhed*, before euer they were either *complained* of, or were brought vnto any *Iudiciall* place.

[1] Baſil. Ep. 70.

In Concilio Triburienſi by him quoted, and likewiſe in the ninth *Canon* of any of the ſeuen *Councils* holden at *Carthage*, there is nothing (leſſe or more) touching either *Accuſation*, *Othe*, or proceeding *of Office*, to be found. And that which is in *Balſamon* in the ninth *Canon* of the *Carthaginian* Councill holden *ſub Honorio & Theodoſio Parno*; is nothing but a Decree, that *an excommunicate perſon ſhall not bee receiued to the Communion, by any other Biſhoppe or Prieſt, vpon paine of the like Excommunication to him that receiueth him.* And the *Tripartite hiſtorie* in the tenth booke and foureteenth chapter, hath no more, then the ſaid former places haue, that way. In the ſeuenth Chapter of the ſame booke quoted alſo by him, it is ſaid, that the old *Accuſers* of *Iohn Chryſoſtome* were againe excited againſt him.

That which he pointeth at by his quotation of *Marcellus Biſhop* of *Rome* (as I coniecture) is conteined in theſe wordes. Hee dehorteth *Maxentius* from perſecuting *Chriſtian Biſhops*, and wiſheth that they be not called in queſtion, till that which hath bene wrongfully taken away, be reſtored vnto them. [2] *And then* (ſaith he) *let him anſwere his Accuſers; and if it bee needefull, let him haue a competent time of deliberation, to wey thoſe things that bee obiected againſt him; leſt being innocent, hee be ouer-throwen by any fraude or deceite. Becauſe it is not lawfull to iudge or condemne any man, before hee haue lawfull Accuſers preſent, and haue libertie for his defence to auoyde the Crimes imputed to him.*

[2] Marcel. ad Maxentium, inter opera Clementis.

Another *B.* of *Romes* authoritie he alſo voucheth to the ſame effect. The wordes he meaneth (I take it) are theſe: [1] *Let not the ſame men be Accuſers & Iudges; but Accuſers by themſelues, Iudges by themſelues, witneſſes by themſelues, and the accuſed by themſelues, euery one in his due order. For firſt of all Inſcription muſt alwayes be made, to the ende that he which accuſeth (if he doe calumniate) may himſelfe receiue the puniſhment appointed for that Crime. For before this Inſcription, no man may be iudged or condemned; ſeeing euen the* [2] *temporall Lawes doe retaine the ſame courſe.*

1 Damaſus Papa Ep. 3. ad Steph. & Concil. Afric. in 1. vol. Concil.

2 Leges ſeculi.

Both which places doe ſhew, what things are required, when the proceeding is by *Accuſation*; but ſpeake nothing to the condemnation of any other courſe. But would they, who (to aboliſh all proceeding *of Office*) do bring theſe places; yea, or would any other in theſe dayes (thinke you) for conſcience ſake and onely to ſee reformation, aduenture this *Inſcription ad pœnam talionis*, in caſe the defendant ſhalbe acquited, *& cuſtodiæ ſimilitudinem*, which theſe places, and the Lawes doe require: and alſo endure *excõmunication*, which the *Canons* do (in that caſe) eſtabliſh to be inflicted? For they may not with reaſon thinke it ouer hard, to be bound by thoſe Lawes and *Canons*, wherewith they hoped they could haue bound others. *Quod quiſq; iuris in alium ſtatuit, eodem ipſe vtatur.* Hitherto in anſwere of their obiections pretended to be taken from the *Scriptures* and ancient *Fathers.*

Now for cloſing vp of this ſecond part, and for proofe (which with this kinde of men, I truſt wilbe impregnable) that an *Accuſation* is not of neceſſity required in proceeding *Eccleſiaſtical criminallie*; let them heare what is eſtabliſhed by the *Diſcipline* [3] *of the French Churches*, compiled together, when *Beza* was preſident of their *Synode*. For in this behalfe they determined, no more to be required, *for calling a man before the Conſiſtory, but that it be not done without cauſe, & ſufficient reaſon.* Where you ſee, no mention of *Accuſation* to be made, either for the firſt preferring vp, or for further proſecution of the cauſe: And therefore their meaning was (as the ordinarie practiſe of all their *Preſbyterial Elderſhips* is) to proceed *Criminally* againſt any *Denounced* vnto them, though it be but by one *Elder* in his Ward; or by any other perſon (vnto whom they giue credite, neuer knowen vnto the *partie* conuented) without other *Preſentment* or *Proſecution* of *Accuſer*

3 Diſcipl. of France, *tit. Eccleſ.* Senate or Conſiſtorie. Art. 11. being the 6. Article in the Synode at Lions.

or

or *parties:* and therefore of their owne *meere Office.*

That this interpretation is not forced, and that the practice of their *Conſiſtorial Elderſhips* is according thereunto; may be made manifeſt by one [1] of *Caluins* Epiſtles vnto *Farellus.* But you are firſt to vnderſtand, that by their *diſcipline*, all dauncing is ſimply and abſolutely forbidden, as a grieuous ſinne, matched with whoredome; and is ſuch, as for which a miniſter muſt be depoſed from his function, no leſſe for the one, then for the other. Nowe it happened, that ſundry in *Geneua* had daunced together in the houſe of one *Balthaſars* widowe, amongſt whom one was a *Syndicke* (which is one of the foure chiefe magiſtrates of that Towne) and another of them was an *Elder* of the Church, for that yeere. This matter comming (I knowe not howe) vnto *Caluins* eare, they were called to the *Conſiſtorie*, and charged with that offence, without any *Accuſer* or *partie* (and therefore of *meere office*) vpon none other ground, but becauſe, *Res mihi comperta fuit:* ſaith *Caluin*, I knewe the matter well ynough. Neuertheleſſe, all (almoſt) that were conuented, denied it at firſt very conſtantly. At length *Caluin* iudged, that they ſhould be driuen to confeſſe the trueth, vpō *their corporal othes.* This was done accordingly, & the matter was thereupon confeſſed: the rather, becauſe *Corneus* (one of the ſame companie) gaue them warning, that he would not ſuffer any of them to be forſworne. Yet for all this, one *Elder Henrich*, ſeeing he was to be depoſed from his *Elderſhip* for it, he would not ſo eaſely giue ouer his hold; but alledged againſt their courſe of proceeding with him (as in the very like caſe *Tho. Cartwright* did not long ſince in the *Conſiſtorie* at *Paules*, before ſundry honorable perſons in *Commiſſion*, and others) that place of *Saint Paul*: viz. *Receiue not an Accuſation againſt an Elder, vnder two or three witneſſes.* But both did it with the like ſucceſſe. For *Caluin* put him off (he ſaith) with a *Dilemma*, & made litle leſſe then a ieaſt, at his ſo impertinent an allegation. For he ſaith, it was *altercatio non illepida*, a pleaſant kinde of controuerſie. Well, notwithſtanding this poore defence, *Henrich the Elder*, being firſt reviled and rated of all; was depoſed from his *Elderſhip*, and alſo ſhut vp in priſon; where he did exaſperate againſt *Caluin* (the chiefe cauſe thereof) the hatred of ſo many, as did beare vnto him but ſclender good will

[1] Calu. Farello, pa 64. Epiſtolarum in folio.

Cartwrights allegation againſt the othe *ex officio* in a criminall cauſe, by *Caluin* anſwered long agoe.

A chiefe Ciuill magistrate, deposed by the Eldership of Geneua, for dauncing.

afore. The *Syndick* also, was for the same offence put out of his *Magistracie*; vntill he should shewe foorth some publike testimonie of his penitencie.

Diuers others of that merie companie, were likewise for the same crime imprisoned. And *Perinus*, though for a time he were stept out of the way as farre as to *Lions*, yet doe what he coulde, *Caluin* there protesteth, that he should not scape vnpunished. So that we see, it was made no *Peccadillo*, or trifling sinne, but an heinous criminall matter (worthie of *degradation*, of *publike penance*, and also of *imprisonment*) against which that *Consistorie* so proceeded without *Accusation* or *Presentment*, and *of meere office*, euen against one of the *Elders* of their Church, and also against a principall *Magistrate* of their Citie; and for which, all that denied it, were compelled to make answere vpon their *corporall oathes* first taken; to answere the whole trueth, which in that behalfe they should be asked, by those of the *Consistorie*. Which not onely touched euery mans owne acte, but (no doubt) reached vnto all their Complices also, which had troden the same dismall daunce together with them.

Thus much of this second part touching the two sortes of proceeding *criminall*; viz. by *Accusation*, and vpon the *Iudges Office* by way of *enquirie*; and for the iustification of the latter of them, by reason, by lawes temporall of this Realme, by lawes *Ciuill* of the *Romanes*, by *Canons*, by examples and proofes out of Gods worde, by auncient Fathers and Councils, and by practice of such moderne Churches, as the greatest oppugners of this course doe account to be best *reformed*: And therefore is manifoldly warranted, both by humane and diuine approbation.

The ende of the second part.

THE THIRD PART

OF

AN APOLOGIE, FOR SVNDRIE PROceedings by Iuriſdiction Eccleſiaſticall; of late times by ſome chalenged, and alſo diuerſlie by them impugned:

Treating

of Oaths: *but more ſpecially, that oaths may* be impoſed tending to the diſcouerie of a mans owne offenſes, and of his brethrens.

Vnto the end whereof is adioyned; *A* Determination *in* Latine: *made (to like effect) by Maſter* D. ANDREVVS, *in the Vniuerſitie of* Cambridge.

* * *

Imprinted at London by the Deputies of CHRISTOPHER BARKER, Printer to the Queenes moſt excellent Maieſtie.

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THE THIRD PART

OF

AN APOLOGIE,

FOR SYNDRIE PRO-

ceedings by Iurisdiction Eccleſia-

ſticall, of Diuerſe Crimes by ſome cha-

lenged, and Calls direct by

them

to

Which: Answer (ſo called) by Mr. Iohn D.

Anno 1599.

An Aduertiſement vnto the Reader.

I Haue not quoted (gentle Reader) any Pages in the Treatiſours *or* Notegatherers *writings, which I haue occaſion to alleage: becauſe thoſe which I followed, are but priuate written copies. but when I had almoſt finiſhed the reuiewing of this Part; I was credibly tolde, that the ſayd* Treatiſe *was put foorth, and ſpred abroad in Print: from* Scotland, *or from* Middleburgh. *and I haue ſince ſeene the ſame in print: howbeit varying in certaine places from my Copy, namely about the latter ende thereof. For there bee ſome additions, which (in my iudgement) differ no leſſe from the ſtile of the reſt; then they doe from the written copy.*

Farewell.

The Contents of the Chapters in this third part.

Chap. 1. MAtters in this third part to be handled: Of the lawfulneſſe of Oathes: What an Oath is: and the reaſon or originall Formall cauſe, of the vſe of Oathes.

Chap. 2. An anſwere to certaine doubtes made concerning Oathes; as namely why in Scripture, God is ſaid to haue ſworne: how (by Oath) he is ſaid to be called to witneſſe: an Oath no tempting of God, but a part of his worthip: why (neuertheleſſe) ſome are repelled from taking Oath: whether *Adiuration* be lawfull: after whoſe meaning an *Oath* is to bee vnderſtoode: whether euery *Promiſſorie Oath*, bee ſimply to be kept: whether an *Oath* may bee diſpenſed with, and how farre: and whether a *Chriſtian* may (by mutuall Oathes) contract with him, that ſweareth by falſe gods.

Chap. 3. Diuiſion of Oathes according to the outward forme of taking them: according to the matter and inward forme of them: with plaine deſcription of euery kind of oathe.

Chap. 4. That the ceremonies vſed in taking and giuing corporall oathes, with laying hands vpon the Bible or Teſtament, and ſwearing by the contents of it, are not vnlawfull.

Chap. 5. The true iſſue of the next opinion in queſtion: two ſortes of crimes and offences prohibited: in what caſes an oath (here ſpoken of) may not be miniſtred: and the manifolde conueniencie and neceſſitie of an oath (ſometimes) to be miniſtred in a cauſe *criminall* and penall vnto the partie: with ſome fewe obiections, touching inconueniencie thereof, anſwered.

Chap. 6. That oathes of men touching matters damnagerable, criminall and penall to themſelues, are vrged and exacted by temporall Courts, and by the lawes of this Realme.

Chap. 7. Wherein are conteyned anſweres to ſuch obiections and reaſons, as be made for proofe of a contrarietie or repugnãcie in theſe oathes, vnto the ſtatutes, lawes, or cuſtomes of this Realme; and a Replie to the Treatiſors anſwers, made vnto certaine obiections, ſuppoſed likely to be made, in iuſtification of this kind of oath, by the temporall lawes.

Chap. 8. That miniſtring of ſuch oathes, is by the Lawes of the Realme allowed vnto Iudges of Eccleſiaſticall courts: and ſome fewe obiections made to the contrary, are anſwered.

Chap. 9. That ſuch oath touching a mans owne crime is allowed, both by the *Canon* and *Ciuill* lawes: how farre, and in what ſort: and that the like is eſtabliſhed and thought equall, by the lawes and cuſtomes of ſundry other nations, aſwell ancient, as moderne.

Chap. 10. An anſwere to ſome obiections, pretended to be made againſt this kind of oath, from the lawes *Ciuill* or *Canon*.

Chap. 11. That not onely ſuch an oath may be taken, but alſo being by Magiſtrates duely commanded, ought not to be refuſed, is approoued by Scriptures; by practiſe of the Primitiue Church, and of late times; together with a Replie vnto certaine anſweres, made vnto ſome proofes here vſed.

Chap. 12. An anſwere to ſuch obiections, as be pretended to be gathered from *Diuinitie*, *Diuines*, and from the *Examples* of godly men; againſt miniſtring oathes vnto parties, in matters of their owne crimes.

Chap. 13. Foure ſeuerall opinions of the *Innouators*, againſt the parties taking of oath in criminall cauſes, with anſweres alſo vnto their reaſons, and obiections.

Chap. 14. That a man being charged by authoritie to diſcouer his knowledge touching ſome offence which his Chriſtian brother is ſuppoſed to haue done, is bound to reueale it; though it may breede trouble, and puniſhment to his brother, and the reaſons to the contrary are anſwered, and refuted.

Chap. 15. Their arguments are anſwered, that condemne the miniſtring and taking of an oath as vnlawfull, becauſe they haue not diſtinct knowledge giuen vnto them of euery particular before the taking of it; and the like courſe (by examples) is approoued lawfull, and godly.

Chap. 16. That after the partie hath anſwered vpon his oath, it is neyther vnuſuall, vnlawfull, nor vngodly; to ſeeke to conuince him, by witneſſes, or other triall; if hee bee ſuppoſed not to haue deliuered a plaine and full trueth: and ſomewhat alſo in approbation of *Canonicall Purgations*, with anſwere to the *Treatiſours* obiections againſt them.

The third part of an *Apologie* for certaine proceedings by Eccleſiaſticall iuriſdiction, of late times by ſome chalenged.

CHAP. I.

Matters in this third part to be handled: Of the lawfulneſſe of Oathes: What an Oath is: and the reaſon or originall Formall cauſe, of the vſe of Oathes.

THat which followeth in this third part of Apologie to be handled (according to the order that I haue propoſed to my ſelfe in the *Preface* before the ſecond) are the chalenges taken either to the *oath of the partie*, which is ſued & conuented: & they are either *againſt the ceremony & outward actions vſed in taking it*; or els becauſe *it is giuen to tie the party to anſwer in a cauſe criminall & penall vnto himſelf:* or elſe they are againſt *examining & vrging men to depoſe touching actions of their brethren being criminall; or at leaſt ſuch, as albeit the examiners do hold and make to be criminall and miſdemeanors; yet the examinates themſelues, doe take them for good and godly, not deſerning any puniſhment, but rather high commendation:* Or they doe touch ſome circumſtance, concurring with the tender of the oath: *as that the examinates haue not diſtinct knowledge of euery particular, whereupon they are to bee examined before they reſolue, whether to take the oath, or not:* Or laſtly, they concerne ſome euent enſuing the oath and examination: as that *the Iudges doe not reſt in that which is affirmed or denied vpon the parties oath; but oftentimes proceed to a further examination by witneſſes, concerning the ſame points.*

This matter of an *oath* is a principall chalenge of theirs, which they drawe and ſpinne out into theſe particular exceptions and chalenges as you ſee. And it is the thing (together with proceeding againſt crimes and offences, *by way of Enquirie, Ex officio*)

wherein you moſt eſpecially deſired a full reſolution, which would to God, either in the reſt or in this, I were as able to doe; as I am readie and willing: and as the matter it ſelfe and goodneſſe of the cauſe would yeeld and affoord, to a skilful and ſufficient man. But the rather to performe my promiſed vtmoſt endeuour; I hold it not amiſſe, for better vnderſtanding of the reſt, to touch (as briefliе and plainly as I can) the nature of an *oath*, and ſome (I truſt) not vnneceſſarie queſtions about that matter which I haue collected.

Firſt I will touch (but very briefly, not taking vpon me to doe it, in ſort as *Diuines* could) the lawfulneſſe of *oaths* with anſwere to ſome obiections, which is the queſtion *An ſit?* I will ſtand the leſſe herein, leaſt I ſeeme to ſeeke, to drawe any of them into hatred; as if theſe *innouating diſciplinarians* did directly condemne *oathes* before *Magiſtrates*; which moſt ſolemnly they proteſt, they doe not. Albeit if all their poſitions (hereabouts) were ſcanned and compared together (ſome holden & deliuered by one, and ſome by others of them) both ſhrewd and lewde concluſions, pricking faſt forwarde to this point; would neceſſarily thereupon follow.

Next I wil handle *what an oath is:* which is the queſtion *Quid ſit?* Then the originall *Formall cauſe*, and alſo *finall* of an *oathe*; which is the queſtion τὸ διότι, (that is) why it is? Afterward, certaine not vnneceſſarie points of doubt; which be made concerning *oaths*, and therefore neerely tending to the better opening of the *qualities* of them. And laſtly how many ſortes and ſeueral kinds of oaths there be; with ſome *deſcription* of them: whereby you may the better vnderſtand what they are, and how they differ one from another: which two laſt doe open the queſtion ἐποῖον τὶ, of what ſort and qualitie the *oath* is.

The lawfulneſſe of an *oath* appeareth; in that wee are in the [1] *Decalogue* forbidden, *to take Gods holy name in vayne:* And in [2] *Exodus* it is ſayd: *Yee ſhall not ſweare by my name falſly: neither ſhalt thou defile the name of thy God, I am the Lorde:* So that to ſweare, is not ſimplie and abſolutely forbiden; but *ſwearing in vayne*, and *forſwearing*. In [3] *Deuteronomie* there is a flat commandement to ſweare: and it is there ioyned, with the *feare and ſeruice of God*, as being an effect of both: *Thou ſhalt feare the*

[1] Exo. 20. v. 7. Deut. 5. v. 11.
[2] Exo. 19. v. 12.
[3] Deut. 6. v. 13. Deut. 10. v. 20. Iſa. 45. v. 23.

Lord

Lord thy God, and ſerue him; and ſweare by his name. And in the prophet [1] *Ieremie* thus, *Thou ſhalt ſweare, the Lord liueth, in trueth, in iudgement and in iuſtice; and the nations ſhall bee bleſſed in him, and glory in him.* And againe the ſame *Prophet* pronounceth a bleſſing vpon ſuch; as duely, and as they ought, doe ſweare by the holy name of God. [2] *If* (ſaieth he) *they will learne the wayes of my people to ſweare by my name, The Lord liueth, as they taught my people to ſweare by Baal: then ſhall they be built in the middes of my people.* And the prophet *Dauid* [3] thus: *All that ſweare by him ſhall reioyce in him, for the mouth of them that ſpeake lies, ſhall bee ſtopped.*

[1] Iere.4.v.2.

[2] Iere.12.v.16.

[3] Pſal.63.v.11.

We finde euen in the *New Teſtament*, that the *Apoſtle Paul* did diuers times ſweare: as [4] firſt, *God is my witneſſe.* And againe; [5] *I ſpeake the trueth in Chriſt, I lie not, my conſcience bearing mee witneſſe in the holy Ghoſt.* Likewiſe in [6] another place, *I call God to witneſſe vpon my ſoule.* Whereupon S. [7] *Auguſtine* thus collecteth: *That ye may know it is no ſinne to ſweare truely; we find the Apoſtle Paul to haue ſworne.*

[4] Rom.1.v.9.

[5] Rom.9.v.1.

[6] 2.Cor.c.1.v.23.

[7] Auguſt.ad Publicol.& Serm.30. de verbis Apoſtoli. Beda in 1.Cor.ca.15.

Therefore where *Chriſt* telling what was ſayde of olde time, viz. [8] *Thou ſhalt not forſweare thy ſelfe, but ſhalt performe thine oaths to the Lord,* doeth after adde this; *Sweare not at all:* muſt haue another interpretation, then *Anabaptiſts* (that be aduerſaries to all oaths) doe frame: for the *holy Ghoſt* is not contrary to himſelfe. There is not one God who is authour of the old *Teſtament*, and another of the New (as ſome blaſphemous heretikes hold) and *Chriſt* came not to diſſolue the *Morall* lawe of God, but to fulfill it: and the holy men that are reported to haue vſed oaths both in the old and in the new *Teſtament*, and haue allowed them by their *Canonicall* writings; were no takers of Gods holy name in vayne, nor miſtakers of *Chriſtes* meaning: for they had the ſpirit of *Chriſt* ſpeaking in them.

[8] Mat.5.v.33. & 34.

In which reſpect S. [9] *Auguſtine* ſaieth hereof thus: *By that which the Saints and holy men in Scripture did practiſe, may bee gathered (oftentimes) how the commandements compriſed in it, are to be vnderſtood.* How then is that commandement of Chriſt to be vnderſtood? The ſame Father in the ſame [10] place doeth teach vs. *The Apoſtle* (ſaieth he) *in that he ſweareth in his Epiſtles, doeth thereby ſhew vnto vs; how that ſaying is to bee vnderſtood:* viz. *I ſay*

[9] Auguſt.lib.de mendacio,c.15.

[10] Ibidem,& lib.1.de Serm. Domini,c.30.

vnto you ſweare not at all: that is not ſo to ſweare, as to doe it lightlie and eaſilie, and ſo (happily) to fall from that vnto a cuſtome of ſwearing, and from cuſtomable ſwearing, vnto playne forſwearing. Therefore wee finde not that the Apoſtle did ſweare; but in his writings: where a more warie conſideration is a ſtaie vnto the raſhneſſe of the tongue.

[1] Ep. 158. ad Publicolam. And againe the ſame S. [1] *Auguſtine* to like effect as afore, doeth elſewhere write: *It is ſayde in the new Teſtament that wee ought not to ſweare at all, which ſeemeth to me therefore to haue bene ſayde, not as if it were ſinne to ſweare, but becauſe to forſweare is a moſt hainous ſinne: from which he would haue vs to bee farre off, in that he admoniſheth vs not to ſweare at all.* And he [2] briefly thus determineth hereof: *Ecce verum iura, non peccas.* S. *Ierome* doeth thus expound [3] that commandement: *Chriſt doeth not here forbid vs to ſweare, but meaneth that we ſhould not ſweare by creatures.*

[2] Serm. 28. c. 3. de verbis Apoſtoli.

[3] Hierom. in 5. Matth.

It is grauely and truely ſayde by a very learned *Schooleman* [4] thus: *An oath in it ſelfe is both lawfull and honeſt: this appeareth by the originall of it: which is becauſe men beleeue that God is trueth that cannot be deceiued, and alſo hath knowledge of all things. Likewiſe by the ende, becauſe an oath ſerueth oftentimes for cleering of men, and taking vp of controuerſies; as is ſayde in the ſixt chapter to the Hebrewes: but yet an oath may turne to the euill of him, which vſeth it ill: that is, without neceſſitie, and due caution.*

[4] Thomas 2, 2.

[5] Matt. c. 5. v. 37. And therefore where it is ſayd by [5] *Chriſt: Let your communication be yea, yea: nay, nay: for whatſoeuer is more then theſe commeth of euill*, hath another meaning then it ſeemeth to carrie at firſt ſhew *ex cortice verborum*: For S. [6] *Auguſtine* ſaieth in another place, thus: *If thou be compelled to ſweare; know that it neceſſarilie commeth of their weakeneſſe, whom thou goeſt about to perſwade; and this infirmitie is a kinde of euill. Therefore he doeth not ſay, whatſoeuer is more; is euill, but commeth of euill. For thou doeſt not euill that vſeſt thy ſwearing well, to the intent to perſwade another man in ſome matter of moment: but it commeth of a kinde of euill in him, for whoſe infirmitie thou art compelled to ſweare.* And in another place thus: [7] *Albeit an oath be more then yea, yea, or nay, nay, and therefore commeth of euill: yet commeth it not of euil from thee, but of their infirmitie, or not beleeuing of thee without an oath.* But *Gratian* teacheth [8] vs, that *by this worde (Euill) in this place wickedneſſe*

[6] Auguſt lib. 1. de Serm. Dom. in monte. c. 30.

[7] Auguſt in c. 3. ad Galat.

[8] 22. q. 1. c. 16.

kedneſſe or ſinne is not to be vnderſtoode, but a puniſhment of ſinne, pœna peccati. And beſides, theſe two ſayings of *Auguſtine*, are ſpoken of *Priuate*, and not of *Publike* oathes.

Now foloweth what an *Oath* is: but firſt touching the name of it, in the Latin tongue: wherein it is knowen, by three ſeuerall wordes: The firſt is *Iuramentum*, a word deriued *à Iure*, of Right or Lawe, as a thing required by *Lawe*: and this is of moſt generall vſe, to all kindes of *Oathes*. The ſecond is *Iuſiurandum*, ſeruing ſometimes in generall, for euery Oathe; but moſt often for that which is called *Deciſorium* which ſhalbe touched afterwardes: The third word is, *Sacramentum*, *à*[1] *Sacrando, becauſe thereby a man doth Denouere, vowe vp and giue ouer his owne ſafegard and proſpering vnto God; if willingly and wittingly, hee ſweare falſly*: which laſt of the three, in the *Emperours* dayes (whoſe conſtitutions are ſet downe *in codice Iuſtiniani*) was moſt of all the three in vſe: and ſo is it vſed for an *Oath*, in all the *Latin Entries*, at the common Law: and thereof comes their *French* word *Serement*.

[1] Quintil. lib. 5. ca. de iureiurando.

S.[2] *Auguſtine* ſaith, *Iurare, eſt ius veritatis Deo reddere*: And againe in the ſame place: *Quid eſt iurare per Deum, niſi teſtis eſt Deus? Tullie*[3] defineth it thus: *Iuſiurandum, eſt affirmatio religioſa*. [4] *Ariſtotle* defineth it thus: ὅρκος ἐστὶ μετὰ θεὸς παραλόγους φάσις ἀπόδειξις, an Oath is a ſpeech voide of proofe by any demonſtration; other then that it is made, by taking the name of God to witneſſe. But more fully (yet briefly) by[5] *Azo, Iuſiurandum eſt affirmatio vel negatio, adhibita religione*. It is not tyed to any forme of wordes, but (in this behalfe) is very manifolde. S.[6] *Ierome* ſaith: *where we finde in the olde Teſtament, The Lord liueth, this is an Oath*. And an other olde[7] writer farre more generally: *whoſoeuer* (ſaith he) *ſpeaketh the trueth, doth (in ſome ſort) ſweare, becauſe it is written, A faithfull witneſſe doth not ſpeake vntruely*.

[2] Aug. ſerm. 28. de verbis apoſtoli
Mag. Sentent. diſt. 39.
[3] Cic. 3. Offic.
[4] Ariſtot. 18. Rhet. ad Alex.
[5] Azo in ſumma.
[6] Hieron. in 4. Ieremiæ.
[7] Chromatius in c. 5. Matth.

The moſt generall *formall* cauſe, and alſo *finall*, of euery lawful *othe*, is for a confirmation of that, whereof we ſweare. Now the confirmation of matters within compaſſe of *Science*; is made by diſcourſe of reaſon; proceeding vpon points, known by the light of nature, to be vnfallibly true. But the ſeuerall *accidentall* facts and wordes of men, cannot by ſuch neceſſarie diſcourſe of reaſon, be confirmed: and therefore, thoſe things that are ſpoken,

concerning ſuch matters, are (for the moſt parte) confirmed by the wordes of ſuch as knowe them. Yet a mans bare word was not thought ſufficient, for confirmation of that, which was to be deliuered by him.

One cauſe, why it is not to be thought *ſufficient:* is the want of care (to deliuer a ſincere trueth) which moſt men be poſſeſſed with through corruption of our nature: but rather in ſteed therof, very vntrueths; as by wicked affections we be lead. Secondly, *humane teſtimonie* is not alwayes ſufficient: by reaſon of want of knowledge: for men can not know things that are to come, nor things abſent, or done in diſtant and remote places from them. Yet becauſe there be ſundry occaſions to ſpeake hereof; and for that it is moſt requiſite, in the common affaires of the worlde; that a certaintie (euen of theſe matters) may be knowen (for manifolde occaſions happening) therefore it was neceſſary for the further credit of ſuch as pretended to be able to ſpeake thereof to haue recourſe vnto *diuine teſtimonie*: for that in God, there is neither vntrueth, nor any thing is hidden from him. And that which is ſo confirmed & ſtrengthened, by ſo much a better & greater *teſtimonie*, thē the bare ſayings of man are, muſt needs be intended to be more ſufficiently, thereby approoued vnto vs.

[1] Concil. Tolet. 8. ca. 2.

To this effect we find it thus determined by a *Councel*;[1] *Whatſoeuer concerneth any league of peace, is then more firmly grounded, when an othe doeth ſtrengthen it. Yea and eche thing that draweth mens mindes to friendſhip and concord, doth continue more faſt; when they are tyed by the bondes of mutuall othes. Whatſoeuer alſo is to bee prooued by witneſſes, is more ſurely verefied, when an othe concurreth with that, which is affirmed. And where witneſſes bee not, it is the ſtrictnes of an oath, which onely can deſcry, of what credite he is, that pretendeth to be innocent and guiltleſſe.* Therefore he that ſweareth by calling God to witneſſe; doeth (as it were) vſe *Gods teſtimonie*, to concurre with his owne ſaying. And it is (in this regarde) generally by all nations preſumed; that what is ſpoken, with ſuch inuocation of *diuine teſtimonie*, may be (probably and for the moſt part) holden for trueth.

[2] Ariſtot. cap. 18. Rhet. ad Alex.

The very heathens by *light of nature*, coulde diſcerne thus much: for [2] *Ariſtotle* ſaith that *no man will forſweare himſelfe, that feareth the puniſhment of God; and ſhame amongs men: conſidering, that*

that albeit his periurie may be hidden from men, yet can it not be concealed from God. And another in this sort: [1] *I know nothing more sacred then an othe, whereby I may approue my faith vnto other men.* And [2] *Tully* to like effect: *Our predecessours, thorough the whole course of this life, thought there was no straiter bonde to tie men, then their othes.* Therefore the *Ciuil* lawe holdeth; that [3] *he which sweareth doth not onely declare, but confirme and establish thereby, his true meaning.* And that law calleth it *a* [4] *religious feare, whereby the quarrelsome boldnes of such as contend in lawe, is restrained.* The *Canons* do call it [5] *vinculū animæ*, a band of the soule; borrowing that speech frō *Diuines.* [6] *Demosthenes* saith; that *an oath is the greatest and graueſt matter, that is amongs men:* and as he elsewhere doth testifie; [7] *to sweare in trueth, is a duetie, which (for the most part) is to be performed of all men.* *Aristotle* hereof further saith [8] thus: τιμιώτατον τὸ πρεσβυτάτον: ὅρκος δὲ τὸ τιμιώτατον ἐστί. *most ancient is most honourable: but an othe is a most worthie or honourable thing.* And an heathen [9] *ciuil* lawyer giueth it this *elogie: Iuramentum maximum expediendarum litium remedium: an othe is an especiall meane for dispatch of suites.* Therefore the more commendable & necessarie an othe is in any respect; the more vglie and horrible is periurie, and the violation of an *othe.* [10] *Aristotle* could discerne thus much. πάντα ἀναιρεῖ, ὁ μὴ ἐμμένων τοῖς ὄμοσι. hee that standeth not to his othe, or performes not what hee sweareth, turneth all the world vpside downe.

It is written of [11] *Agesilaus*, when he heard howe *Tissaphernes* the Generall of the *Persians* had broken the league, which was mutually agreed vpon, and also confirmed by othe betwixt them; that hee saide he tooke himselfe greatly beholding to *Tissaphernes* for it; for he doubted not, but God and men, woulde take vengeance on him that had periured himselfe; and woulde on the other side prosper, and giue good successe vnto himselfe in those warres; who was willing to keepe his othe, but was deceiued by the other. And [12] *Plato* accounted periured persons, as so many monsters amongs men; and therefore sayth; they seeme to be of the race of the *Tytanes*, insomuch as (by their periuries) they doe no lesse then those Gyants were fayned to haue done, that is, euen wage battaile with God himselfe. Hitherto concerning some part of the nature of othes.

[1] Tereat. in Hecyra.
[2] Cic. lib. 3.
[3] L. Antistius. ff. de acquir. hæred.
[4] L. 1. C. de iuram. calumn.
[5] c. cum continget, & c. si vero, de iureiurando.
[6] Demost. contra Baotum.
[7] Idem contra Aristocr.
[8] Arist. 1. metaph. cap. 3.
[9] Vlpian. l. 1. ff. de iureiurando.
[10] Aristot. 1. lib. Rhet. ca. 15. in fine.
[11] Plutarch. in apotheg. Ælian. 14. var. hist. c. 2.
[12] Plato lib. 12. de legibus.

CHAP.

CHAP. II.

An answere to certaine doubtes made concerning Oaths; as namely why in Scripture, God is said to haue sworne: how (by Oath) he is said to be called to witnes: an Oath no tempting of God but a part of his worship: why (neuertheles) some are repelled from taking Oath: whether Adiuration *be lawfull: after whose meaning an* Oath *is to be vnderstoode: whether euery* Promissorie Oath, *bee simply to be kept: whether an* Oath *may be dispensed with, and how farre: and whether a* Christian *may (by mutuall Oaths) contract with him, that sweareth by false gods.*

[1] Ad Heb. 6. v. 16.

SEeing then (as the [1] *Apostle* testifieth) an Oath is made by him that is greater: it may be asked, how (in Scriptures) God is reported, to haue sworne?

The same Scripture doth answere it selfe, in this point: for it is there saide; that *men* when they sweare, *do sweare by a greater, but* [2] *God hauing no greater to sweare by, did* [3] *sweare by himselfe.*

[2] Ibidem v. 13.
[3] Genes. 22. v. 16. Isai. 45. Ierem. 49. v. 13. Ierem. 22. v. 5.

Nowe becaus an *Oath* is for a *confirmation* of trueth vnto others, least he be supposed to speake vntruely, as hath bene said: how can this doubt fall in God, who is *trueth it selfe?* I answeare (as afore) it is [4] *amongs men*, that an Oath, is for such *confirmation.* But when in Scripture God is reported to haue sworne; this is not, in respect of any possibilitie, that defect of truth may happen to be in his *diuine Maiestie*, which had neede so to be confirmed, or as if it were not needefull for vs wretches, to rest in his sacred single word: but it is done, [5] *more abundantly to shewe vnto the heires of promise, the setled incommutabilitie of his counsell or decree: that by two vnchangeable things, in which it is impossible God should faile, or be deceiued; we might haue strong comforte.* So that thereby we are taught to our comfort, that what is so confirmed by Gods Oathe; doth proceede, from the infallible and vnremoueable determination of Almightie God.

[4] Hebr. 6. v. 16.
[5] Ibid. v. 17. 18.

It may be asked, in what respects God is said to be called vnto witnesse by an *Oathe?*

I answere with the *Schoolemen*, for two respects: the first is, becaute

becauſe he oftentimes reuealeth and bringeth foorth the verie trueth of a matter (vntruely deliuered by any man) either by inward inſpiration of ſome other perſon, or elſe by bringing it to the open light and view of the worlde, which (afore) was kept cloſe and ſecret. The ſecond conſideration is for his puniſhing of all thoſe, that ſweare vntruely: and heerein hee is as in this worlde their witneſſe; ſo either heere, or in the world to come; he is their Iudge, and a reuenger. A *ciuil Lawyer*, though but an heathen, could ſay, *Qui peierat, Deum habet vltorem*, God himſelfe will take vengeance, of a periured perſon.

Neither can an Oathe be ſaide to be a tempting or a prouoking of God, ſo long as it is vſed, but vpon neceſſity, or good occaſion.

An oath is ſaid to be a ſeruice and worſhip yeelded vnto God himſelfe, in a two-fold regarde: the firſt is, in that we fulfil and performe that, which we ſweare: the ſecond, in that by calling of him to witneſſe, we do withall acknowledge, that he knoweth all things; and is a ſwift Iudge and Reuenger *of all thoſe that loue or make leaſings.*

So that albeit an oathe, in reſpect of the matter concerning which it is made (for the moſt part) may be termed an *humane* and *ciuill* matter: yet in reſpect of him who is called to witneſſe; it is alwayes a *diuine*, and a *religious* acte.

But inſomuch as an Oath is (vpon diuerſe occaſions) neceſſarily required of vs, as a peece of Gods ſeruice & worſhip: it may be queſtioned; why ſome ſorte of men are repelled by politike Lawes, from taking any Oath, and from bearing teſtimonie? I anſwere, that *children*, *mad men*, and ſuch like, are not admitted to take oathes; becauſe they haue no perfite vſe of reaſon: and therefore do want that due and reuerend conſideration, and alſo that [1] *iudgement*; which the worde of God requireth, beſides *trueth* and *Iuſtice*, to be had and vſed in taking of an Oath. but *periured* perſons, are therefore to be repelled; becauſe by their demeanour fore-paſt it is made apparant, howe ſlender account they make of Gods holy name: for their contempt (in this behalfe) is intended ſtil to reſt in them: *Semel malus ſemper præſumitur malus*; *præſertim in eodem genere delicti.*

[1] Hierem. 4. v. 2.

It is made doubtfull (in diuerſe reſpects) whether euery or

any *adiuration* be lawfull to be vſed amongs *Chriſtians?* the reſolution whereof, will beſt (I thinke) be made manifeſt, by the *definition* thereof, and by *diſtinction.*

[1] Thom. 1. 2. q. 90. in Axiom.

To *adiure* (as [1] *Aquinas* doth define it, though not altogether ſo generally) *is nothing elſe, but to induce or prouoke one to do or omit ſomething, by vſing or interpoſing of the name of God, or of ſome other ſacred thing.* This is vſed either towards *our ſelues*, or elſe towards *others.* towards *our ſelues*, as when by a *promiſſorie Oath* or vow, we binde our ſelues *ſolemnly* to God, for performance of ſomething. And this kind of *adiuration* may be lawful, or vnlawfull; according to the ſeuerall qualities and circumſtances of the matters; which wee haue ſo *adiured* or bound our ſelues to performe; which is not my purpoſe (here) at large to proſecute.

The conſideration of *adiuring others* reacheth either to ſuch, as be no way *vnder* the *Adiurers* auctoritie, or to ſuch as bee. Of thoſe which bee not vnder the *Adiurers* authoritie; the firſt, is *God* aboue all. Now, albeit we vſe in our prayers vnto his *diuine Maieſtie*, ſundrie vehement obteſtations, as by his *holie name* and for his Goſpels, and his ſonne *Chriſt Ieſus* his ſake, and for the promiſſes made in him: yet is not this (properly) to be called *Adiuration*; as though by this earneſtneſſe we thought men could, or did meane, to moone or change his will, which is immutable: but that hereby we may the better enkindle, and ſtirre vp our owne faith: to the ende, we may be more fit to obtaine that, which in his eternall wiſedome he hath decreed, and thought fit to beſtow vpon vs.

The ſecond member is of ſuch, as be *creatures*, and theſe are either *vnreaſonable:* towards whome (as I take the matter) all *Adiuration* as it is vaine (in that they heare vs not, or vnderſtand vs not) ſo is it alſo vnlawful: or elſe they be *reaſonable* creatures. Of *reaſonable* creatures not ſubiect to the *Adiurers* authoritie, ſome be *Spirits*, and ſome be *men.* To *adiure Spirits* being abſent, whether they be *good* or *euill Spirites*, ſeemeth both vaine; and vnlawfull: for that wee haue neither warrant ſo to doe, nor yet, that they doe or can heare vs. Beſides that, their actions are not ſubiect to our directions, but vnto Gods alone. For (as *Aquinas* there alledgeth out of Saint [2] *Auguſtine*) *Spiritus deſertor,*

[2] Auguſt. li. 3. c. 4. de Trin. Tom. 3.

regitur

regitur per ſpiritum iuſtum. But if they be *euill Spirites*, though they certainelie might bee knowne to bee preſent, in reſpect ſome that them are thought to be condemned into the aire, ſome into the waters, and ſome into the entrailes and caues of the earth, as diuers very learned men doe holde: yet to doe this; with intent to learne or obtaine anie thing of them, it is (without doubt) *ſimply vnlæwfull*; and they [1] before God abhominable, that ſo doe adiure, or contract any familiaritie with them. But the ſayde learned *Schooleman*, by force of that place of Saint [2] *Lukes* Goſpell, *viz. Beholde I giue vnto you power to treade on Serpents and Scorpions, and ouer all manner power of the enemie, and nothing ſhall by any meanes hurt you*; thinketh it lawfull for vs, in the name of God, to *adiure* euen euill *ſpirites*; to the end onely, that they hurt vs not, either *ſpiritually* or *bodily*.

[1] Deut 18 ver. 10, 11 & 12.

[2] Luke 10. ver. 19

But the *Adiuring* of ſuch *men*, as be not vnder the *Adiurers* power or ſubiection, is ſought to be done, either by way of *compulſion* or ſeeking to lay vpon them (thereby) ſuch a neceſſitie, as a man may (by *vowe*) impoſe vpon himſelfe, (which is vnlawfull, becauſe it is an vſurpation of a power ouer another, that is not giuen him) or elſe; it is by way of perſwaſion, to mooue him, the rather by the reſpect of the *ſacred name of God*. and this is thought not vnlawfull to bee vſed, in matters lawfull, and of importance.

There reſteth onelie nowe to ſpeake, of the vrging (by courſe of *Adiuration*) of ſuch other *men*, as bee vnder our authoritie. This vrging is doone; either in waie of *abſolute compulſion*, or elſe but *cauſatiuely*. *Abſolute compulſion* (in this matter) I call it; when a man ſeeketh, as deepely and *neceſſarily*, by ſuch *Adiuration*, to tie a mans will and conſcience: as hee may doe, by the like *obteſtation of Gods name*, binde his owne will, and himſelfe. And this *Adiuration* is very vnlawfull: becauſe euery man is lorde and guider of his owne will, & of his owne voluntarie actions, but not ſo of anie other mans. And according to this acception is that of [3] *Origen* to bee vnderſtoode, where hee ſayth thus: *I thinke, that hee which will liue according to the Goſpell, ought not to adiure another man: for if by Chriſtes commaundement in the Goſpell, it*

[3] Origen. hom. vlt. in Matth. Tom. 3.

be not lawfull to ſweare; it is euident, that a man may not adiure another: and therefore it appeareth, that the high Prieſt did vnlawfully adiure Chriſt, by the liuing God.

But if it be but *compelling cauſatiue*, that is in reſpect of the duetie which euery inferiour (by oathe or otherwiſe) oweth vnto his ſuperiour, proceeding iuſtly and according to Lawe: then is this *Adiuration* lawfull; and requireth neceſſarilie, the inferiours obedience therein, vpon perill of ſinne and penaltie of the Lawe. The vſe heereof we reade as well in the Olde, as in the *Newe Teſtament*. [1] *Salomon* ſayeth, *Hee that is partener with a thiefe hateth his owne ſoule, for heehereth curſing, and declareth it not*. I am tolde by thoſe that are very skilfull in that language, that the *Hebrewe* interpreters doe expound *this curſing* (which is heere ſpoken of) to bee an *Adiuration* and curſſe, that was vſually made by the *Prieſts* againſt ſuch; as had ſecretely doone, or knowen of any offence: to induce them hereby the rather, to reueale it.

[1] Prou.29.v.24.

And in the *New Teſtament*, the very word of *Adiuration* is vſed by Saint [2] *Paul*. ὁρκίζω ὑμᾶς τὸν κύριον, ἀναγνωσθῆναι τὴν ἐπιστολὴν πᾶσιν τοῖς ἁγίοις ἀδελφοῖς. *I adiure you by the Lorde to reade this Epiſtle to all the holie brethren*. And it is woorth the conſideration, whether that be not alſo an *Adiuration* where he [3] ſaieth, τοῦτο οὖν λέγω, καὶ μαρτύρομαι ἐν κυρίῳ &c. *This therefore I ſay and teſtifie in the Lorde, that yee walke not as other Gentiles walke, in the vanitie of their minde*. Thus farre of *Adiuration*.

[2] 1. Theſſ.5.v.27.

[3] Epheſ.4.ver.17.

Where there may bee ſome doubt by reaſon of the variable acception of ſome wordes of an oath; queſtion is made according to what ſence, ſuch oathe muſt be vnderſtoode, taken, and performed by him that ſweareth.

This queſtion doeth [4] *Iſidore* thus anſwere: *with what cautell of wordes ſoeuer a man doeth ſweare; yet God, that is witneſſe of the conſcience, ſo takes it, as he that giues the oath, doeth vnderſtand it. For that man which will take vantage vpon the wordes of it, is guilty two wayes: both becauſe he takes Gods Name in vaine, and alſo circumuents another by deceite. therefore if hee that ſweareth meane ſimply and not guilefully, then is he bound, according to his owne intention.* But when the wordes are or may be of another ſignification, then either the taker, or the tenderer of the oath doeth meane;

[4] Iſid. li.2.ca.31. de ſummo bono.

meane; In this caſe, it is thus by [1] *S. Auguſtine* grauely & briefly reſolued: *ream linguam non facit niſi mens rea:* It is not the words, but the guiltie heart that maketh the periurie: which it ſeeemeth he tranſlated out of * *Ariſtotle*, τὸ ἐπιορκεῖν ἐν τῇ διανοίᾳ, καὶ τῇ ψυχῇ ἐστι, *forſwearing is of the heart, and not of the mouth alone.*

[1] Aug. ſerm. 28. cap. 2. de verbis Apoſtoli.

* Ariſt. 1. Rhet. cap. 15.

Thomas of [2] *Aquine* (in this behalfe) thus writeth: *when the meaning of him that ſweareth, and of him that tendereth the oath, is not the ſame; if this doe happen, by the fraudulent meaning of the taker of the oath: then ought ſuch oath to be kept, according to the ſound intent of him, to whome, or by whome it is tendered:* In which reſpect, the olde verſe is to good purpoſe:

[2] Tho. 2. 2. q. 98. ar. 7.

[3] *Fallit iurantem, iuratio facta per artem.*

[3] Glo. in Auth. iuſiurandum.

A cautelous & crafty oath (in trueth) *deceines none ſo much as him, that taketh it:* if by his owne fraude he thinke to eſcape periurie. therefore whereſoeuer any fraude or cauill is vſed by him that taketh the oath; there *periurie* in the ſight of God, is committed.

[4] *Martiall* but an heathen *Poet*, could diſcerne thus much:

[4] Martial. li. 6. Epigr.

Iurat capillos eſſe quos emit, ſuos,
Fabulla: nunquid ille Paulle peierat?

A man weares haire on his head that he bought, and yet ſweares they be his own haires: I pray you ſir is he forſworne, or not? Friuolous then and ridiculous is that excuſe, whereby *Popiſh* writers would excuſe their *S. Francis* of a lye, vnder pretence of his charitie, and good zeale. [5] For on a time, a manſlayer came fleeing away by him; and being purſued with hue and crye; *Fryer Francis* was asked by one of the purſuants, whether he ſaw ſuch a man paſſe that way, or no? whereunto (putting firſt his hand into his ſleeue, or as ſome write, his finger in his eare) he anſwered, that he ſaw no ſuch mā paſſing that way, meaning through his owne ſleeue, or eare. In deede ſuch deceitfull anſwering or ſwearing, is ſo farre from excuſing a man from vntrueth & periurie; that [6] *Tully* ſayth thereof thus: *fraus diſtringit non diſſoluit periurium*, fraude and cautelous dealing, doeth not excuſe or qualifie; but tyeth harder, and enwrappeth a man further into periurie. Hereupon it is alſo ſaid in lawe, thus: [7] *Conditiones tacite ſubintellecta non faciunt iuramentum conditionale*, conditions and priuate proteſtations, which hee that ſweareth frameth in himſelfe, or keepeth

[5] Angel. in li. 3. § ſi tibi iudic. ff. de condict. ob turpem cauſam.

[6] Cic. lib. 3. Offic.

[7] Gl. in. c. quemadmodum. de iureiurando.

in his owne minde, doe not make the oath to bee conditionall which is giuen him ſimply.

It may alſo be asked, whether euery *promiſſorie oath*, is *ſimply* and *abſolutely* to be kept, or howe farre?

For anſwere hereof, I wil note vnto you, what I finde (probably) ſayde; and then leaue the exact reſolution thereof, vnto graue *Diuines*.

Euery ſuch *oath*, is ſimply to be kept, if it happen not into ſome of the three caſes here touched.

The firſt of theſe caſes is; when the thing, by oath promiſed or vowed to be done; was (in very trueth) euen at the firſt taking of it, ſimply, and in it ſelfe euill; howbeit perhaps not then diſcerned ſo to be, by him who tooke the oath. And in this caſe, the partie ſinnes grieuouſly in ſwearing; but more grieuouſly hee ſhould ſinne, if hee kept his oath. For euery oath muſt be made * *in iuſtitia*, in righteouſneſſe. And [1] *iuramentum non eſt vinculum iniquitatis, vel cuiuſcunque criminis*, ſayeth *Saint Auguſtine: an oath tyeth no man to doe that which is wicked.* To like effect ſayth *Iſidorus, In* [2] *malis promiſſis reſcinde fidem; in turpi voto muta decretum; quod incautè vouiſti, ne facias: impia eſt enim promiſſio, quæ ſcelere adimpletur.*

* Ierem.4.V.2.

[1] 22.q.4.per totũ præſertim c. inter cætera. Auguſti Seuero: & c.quã. to. de iureiurando.

[2] Ibidem c. in malis ex Iſidoro in ſynony. lib.2.

The ſeconde caſe is, when that which is promiſed by ſuch oath; is an hinderance and impediment to a greater good, as if a ſufficient man for it, ſhould ſweare neuer to be a miniſter of Gods worde and Sacraments; what deſire ſoeuer him ſelfe ſhould afterward haue thereunto, or what neede ſoeuer the Church of God ſhould haue of his helpe in the miniſterie. In ſuch a caſe, hee ſinnes by his raſh ſwearing; but not in keeping the oath, as the *Schoolemen* holde, albeit they thinke it better he ſhould breake the like oath; then that he ſhould keepe it.

The thirde caſe is, when as ſome vnlooked for accident is diſcouered, or falleth out afterwarde; that was not thought vpon before. Nowe, if by ſuch euent enſuing, the oath cannot be perfourmed without crime and impietie; then (without doubt) is ſuch perfourmance of the oathe a ſinne, as well as in the firſt caſe of the three. *Saint Ambroſe* in this [3] behalfe ſayth thus: *It is ſometime againſt Chriſtian duetie to perfourme a vowe promiſed by oathe: ſo Herode offended which put Iohn Baptiſt to death,*

[3] Ambroſ. de offic. lib.3.c.12.

death, rather then he would goe backe with his oath and promiſe. Yea euen where ſuch oath might bee perfourmed without ſinne; yet may there be ſundry caſes, wherein the partie is thought not to be bound, vnto performance. As imagine, that I being to receiue [1] money which is in telling for mee; doe in the meane time (in aſſured hope to receiue it) ſeale an obligation, and withall ſweare to pay vnto him ſo much money at ſuch a day. Neuertheleſſe if the intended *creditor* ſhall thereupon refuſe to deliuer me any money; or if any other accident (without my default) doe happen, whereby I could not receiue it; in ſuch a caſe, neither mine oath, nor obligation doeth binde me, to performance and paiment. Therefore theſe rules enſuing are gathered out of that, and ſundry other like lawes, viz. *iuramentum non porrigitur vltra conſenſum.* [2] *Cenſetur clauſula appoſita in iuramento, quòd promiſſio valebit, rebus in eodem ſtatu remanentibus.* [3] *Iuramentum non extenditur ad inopinata. Non* [4] *extenditur ad ea de quibus non eſt cogitatum.* And *Iuramentum* [5] *non extenditur ad incognita.* And vpon theſe grounds it was; that the Emperour *Veſpaſian* did [6] releaſe, or (as we more vſually nowe ſpeake) *diſpenſe* with a certaine knight of *Rome*, for his oath. This knight had *ſolemnly* ſworne vnto his wife; that he would neuer put her away. Which he might (otherwiſe) lawfully haue done (by the heatheniſh cuſtome of that *Citie* then) either for any iuſt cauſe, or for no cauſe at all. After this oath, the wife was taken in adulterie; therefore the *Emperour*, *diſpenſing* with her husbands oath (becauſe in all likelihoode, the knight in ſo ſwearing, neuer dreamed of ſuch a trecherie) the knight then without ſcruple; did repudiate, and forſake his adultereſſe wife.

For the like [7] reaſon did *Antonius* and *Verus Emperours*, *diſpenſe* with the oath of one (being choſen *Duumvir*, a chiefe *Magiſtrate* in *Municipio*, not much vnlike vnto one of the *Conſuls* in *Rome*) who had afore ſworne; that hee would neuer after that time be preſent in any meetings or aſſemblies of the Senators, or Decurions there. Out of which place, a [8] writer vpon the *Ciuill* lawe doeth gather; that the *Emperour* may diſpenſe with a mans oath.

Here then another great, and not vnneceſſarie doubt ariſeth; whether any *man* may *diſcharge* or *diſpenſe* with another mans oath;

[1] L. finali. C. de non numer. pecunia.

[2] Arg. l. Quod Seruius ff. de condictio cauſa dati.

[3] c. tua nos. de eccleſ. ædific.

[4] c. veniens. & c. Quinta vallis. de iureiurando. c. ex multiplici. de decimis. Arg. c. audita. de reſtitut. ſpoliatorum.

[5] c. ad noſtram. el. 2. de iureiurando.

[6] Sueton. in vita Veſpaſiani.

[7] L. vlt. ff. ad municipialem.

[8] Alberic. de Roſ. in l. quotiens C. de precibus Imper. offer.

oath; and if he may, how farre, and in what cases this may bee done?

In answer whereof; we are first to vnderstand, that according to the distinction of times, into time *past*, *present*, or *to come*, there is also diuersitie of oaths. One kind of oath (in such regard) is termed *Assertorie*; which is an affirmation or deniall with oath, touching some thing that is *past* or *present*. Nowe there is no doubt, but that this oath cannot at all be discharged, released, or dispensed with; by any humane authoritie. for the matter of it being either concerning a thing *past*, which cannot bee altered and reuoked; or present, which is also immutable; insomuch as it is impossible for a thing both to be, & not to be at once: therefore, the oath it selfe must needs be vndischargeable, and *vndispensable*: for to giue a *dispensation* herein, were no lesse, then (in effect) to determine; that it is lawfull to haue *trueth* wanting in some oaths: insomuch as other *dispensation* then this, the nature of things *past* or *present*, cannot admit.

The other kind of oath, is called *Promissorie*: whereby a promise (confirmed by an oath) is made, that some thing shall bee done or not done, hereafter. And about this kinde of oath, the doubt onely resteth.

This *Promissorie* oath is made, either touching such matters as doe immediately and apparantly tend to the aduancing of the glory of *God*, or to the benefite of sundry others, whether such benefit be *spirituall* or *corporall*: or concerneth such matter, which euidently derogateth from the *glory of God*, or from the benefite of others; or it is of a matter tending to the onely profite and benefite of some particular man; to and for whose behoose such promise (with oath) is made: or lastly, it consisteth and is bestowed vpon such matter, as by reason of some euent happening, or at least discouered afterward; it may bee iustly thereupon doubted, whether the oath it selfe doe binde or not, bee lawfull or vnlawfull, expedient or not expedient, profitable or hurtfull to the partie (all circumstances considered) to bee kept and obserued.

In the first case of these foure, no man can discharge from or *dispense* with such oath; except either the oath were at first but conditionally made, and the condition faileth; or else were made by

by ſuch one, as is vnder an husbands or fathers ſubiection. For in the firſt of theſe excepted caſes (in very trueth) the oath bindeth not at all. But yet ſome ſuperiours declaration of ſo much, is therefore neceſſarie; becauſe it is moſt dangerous to permit vnto euery ſimple and priuate mans owne diſcretion and iudgement; how farre, and where he neede or neede not, to performe his *promiſſorie oaths*. And in the later of the caſes excepted, *an* [1] *husband or father* (before he hath giuen any expreſſe, or implied ratification) may (euen by Gods owne lawe) diſcharge and diſanull *his wiues oaths and vowes, or his daughters, being made in her youth, and in his houſe* (that is vnder his power) of what ſorte and qualitie ſoeuer they bee, yea though ſuch *promiſſorie oathes haue bene* [2] *made by them, to humble the ſoule.* and then by reaſon of ſuch diſallowance thereof by their ſuperiour, it is there ſayd: *The Lorde will forgiue her*, this breach of her *oath* and *vowe* made.

[1] Num. 30. per totum ferè.

[2] Ibid. v. 14.

Now becauſe in any (ſauing in theſe excepted caſes) this kind of oath is ſimply *vndiſpenſable*; therefore we doe deteſt the preſumption of the *biſhop of Rome*; who taketh vpon him oftentimes to commute euen this kinde of oaths and vowes (as hee ſaieth) into better. and ſo by this ſhift of deſcant, hee pretendeth to diſcharge men from their *formall oaths*, by them aduiſedly taken and made, to the glory of God, and for the benefit of others.

The ſecond ſort of thoſe foure kindes of *promiſſorie oaths* are ſuch; as if a man ſhould performe; hee ſhould doubly ſinne. which point I haue ſomewhat touched in the queſtion next going afore. yet leaſt a man doe erre herein, by miſtaking; it is holden very requiſite, that he conſult with wiſe & learned *Diuines*; both to reſolue him, whether ſuch oath be ſimply vnlawfull by him to be performed; and alſo to aduiſe him, what courſe hee is to take in reſpect of his ſoule and conſcience; for his oath ſo vnlawfully, and vniuſtly made.

In theſe vnlawfull oaths, wee thinke that ſuperiours whether *Ciuill* or *Eccleſiaſticall*, not onely may and ought to diſcharge the parties thereof, if they be ſcrupulous and deſire it; but alſo may and ought, to diſanull and make them voyde, though the parties themſelues bee vnwilling thereunto. And ſo wee finde,

[1] 34. Edw. 3. ca. 9. that a [1] *Parliament* here in *England* did enact in these words, viz. *That all alliances and couins of Masons and Carpenters, and Congregations, Chapters, ordinances, and oathes amongst them made, or to bee made: shall bee from henceforth voyde, and wholy adnulled.* The reason of this *disannulling* of all such oaths was; for that they were apparantly derogatorie, to the publike good of the *Common wealth.*

With these kindes of oathes, the man of *Rome* not onely *dispenseth* when they are alreadie made, which were tolerable amongst them of his owne onely proper *Iurisdiction*; but also (in the pride of his heart, *exalting himselfe aboue all that is called God*) hee *dispenseth* with men aforehand, to make such vnlawfull oathes and vowes: and namelie of marriages, and also to remayne in them, being within the *degrees Leuiticall*, which by God himselfe are prohibited plainely. yet becausse (for very shame) hee seldome doeth *dispense* with marriages contracted, or to bee contracted *inter ascendentes & descendentes*; as the father to marrie the daughter or his niece, &c. or the sonne to marrie his mother, grandmother, &c. or yet *in primo gradu transuersali æquali*, as the brother to marrie the sister: therefore the *Schoolemen* and *Canonists* his Parasites (but especially since the great case fell out betwixt king *H. 8. and Katherine of Castill*, his deceased brothers widowe) haue bene contented to turne those their former olde songs; of *Papa potest, quicquid Deus ipse potest*, and *potest tollere ius Nature*; and (in stead thereof) to say [2] now; that in those aforesaid degrees of *consanguinitie* (because they are of *the lawe of nature*) the *Pope* (their vnholy father) can not *dispense* withall. Neuertheless, they do still no lesse resolutely, then impudently hold, that the prohibitions in the rest of the [3] *Leuiticall degrees* are not of the *lawe of nature*; and therefore to be, by the *Pope* dispensable. But if they be lawes *Ceremonial*, they are abrogated by *Christ*, and need no *dispensation* of any mans. If *Iudiciall*, then they binde none precisely, but the people and *Common weale* of the *Iewes*: but if they be *Morall* lawes (which onely remaineth, and of which sort in deed they are) then consequently are they of the *lawe of nature*. and, that the said prohibitions be in deed *Morall lawes*, and of *the lawe of Nature*: appeareth by the words of God himselfe, generally testifying of them all,

[2] Contrauias.

[3] Leu. 18. ca. & 20.

all, that for ſuch abhominable & inceſtuous matches as be there ſpecified and forbidden; he did caſt out the *Cananites* and other people of the land, before the *Iſraelites*. But they, being heathens, had none other lawe but the *lawe of nature* to take knowledge of, or to binde them; and therefore could not for thoſe pollutions haue bene iuſtly puniſhed; if the prohibitions of them, had not bene by the *lawe of Nature*, which bindeth all men indifferently.

In the third caſe, *videlicet*, when a *Promiſſorie oath* tendeth onely to the profite and benefite of ſome particular perſon, to whom ſuch promiſe is made (as namely an oath of a *Soldiour* to his *Generall*, of a *Subiect* to his *Prince*, of a *Tenant* to his *Lord*, or of a *bondman* to his *Maſter*) it is generally holden; that hee to whoſe onely behoofe it was made, may ſufficiently agayne diſcharge it. becauſe it is intended, the promiſe is (in deed) then performed vnto the ſuperiour, when it is diſpoſed of according to his pleaſure, and as he liketh beſt of.

The fourth and laſt aforeſayd ſorte of oathes *Promiſſorie*, is the ſpeciall ſubiect, wherein (if in any) a *diſpenſation* may properly haue place.

To *diſpenſe*, or to diſcharge a man from an oath taken; hath two diuers ſignifications and acceptions. for it is taken, either for a releaſe of the very bonde of the oath, ſo that the partie ſhould no more (before God) bee tied thereunto: or elſe for a ſound *interpretation* and *declaration*, that vpon ſome euent enſuing, or diſcouered vnto vs afterward, or other conſiderable circumſtance; ſuch oath doeth, not neceſſarily (before God) require a performance.

A *Promiſſorie oath* is made, either for *confirmation* of ſome thing, vnto the performance whereof, wee are (otherwiſe alſo) bound by Gods lawe, or by the lawe of nature: or of ſuch, as for accompliſhing whereof, we are beſides our oath, tied by *poſitiue lawe* of man: or of ſuch, as otherwiſe then by oath, we (no way) ſtood bound to fulfill.

The laſt of theſe three is alſo of two ſortes: for it either concerneth matter ſome way tending to the *ſeruice of God*, and *humbling* of our ſelues before him, voluntarily by vs promiſed; or elſe matter *humane* and *ciuill* onely, by our oath confirmed.

In the firſt of thoſe three laſt, wherein beſides our oath, wee are bound by *Gods lawe*, or by the *lawe of nature*; a *diſpenſation* by way of releaſe of the *bond of the oath* cannot by any humaine authoritie be giuen. for elſe, a man might (hereby) be ſet at libertie, not onely to breake the law *of God* and *nature*, which is eternall and immutable: but to goe againſt his owne oath alſo: which, being *Præceptum iuris Diuini*, is alſo (in that ſenſe) vndiſpenſable. Except a man ſhould abſurdly imagine, as the heathen Romanes did of a water, that was in *Via Appia*, conſecrated vnto *Mercurie*; for they [1] were ſo beſotted as to thinke, if a man did beſprinkle his head with a Lawrell branch dipped in that water, therewith calling vpon *Mercurie*; that by ſuch *expiation*, hee was clearely diſcharged from any breach of oath, and from *periurie*. But as *diſpenſation* is taken for a ſound and true *interpretation* of thoſe lawes, how farre they reach, and where the generall wordes of them ought to ceaſe; it hath place euen in theſe; whether they bee precepts *Affirmatiue* or *Negatiue*, that rule of the *Schoolemen* notwithſtanding, videlicet; *Præcepta diuina negatiua obligant ſemper & ad ſemper: Præcepta affirmatiua licet ſemper, tamen non ad ſemper.*

[1] Alex. ab Alexand. Genial. dier.

For examples ſake; firſt in *Precepts Negatiue*, conteined in Gods lawe: if a man ſhall ſweare for more preciſe obſeruation of that commaundement, *Thou ſhalt not kill*; that he will neuer ſhed any mans bloud; yet, if in neceſſarie defence of his [2] perſon or [3] goods, hee ſhall afterward kill a thiefe, the Superiour may (in this caſe) by way of ſuch *diſpenſation* lawfully declare; that hee is not (hereby) to bee holden guiltie of the breach of that commaundement, or of his oathe. Likewiſe if a married man who voweth and ſweareth neuer to companie with any woman, but his wife, during their two liues, ſhall (without any negligence or default of his) bee herein wickedly deceiued by another woman, which is by him taken to be his owne wife: it may (for his ſatiſfaction) by ſuch *diſpenſation* bee determined & declared, that hereby he hath neither offended againſt Gods lawe, nor his oath.

[2] l. vt vim. ff. de iuſt. & iure. & ibi gl. & DD.

[3] Iaſon in d. l. qui dicit eum eſſe communem. & Diaz. reg. 597.

In precepts *affirmatiue*, conteined in Gods law: [4] *Chriſt* himſelf hath declared, that the *Prieſts* imploied on the *Saboth*, about the *ſacrifices of the Temple*, or thoſe who (on that day) [5] circumciſed children;

[4] Matth. 12. v. 5. 8

[5] Ioh. 7. verſ. 23.

children; and others[2] doing on that day, the neceſſarie workes of charitie; or that,[3] whereby mans life is neceſſarily ſuſteined, do not violate the *Saboth* therein.

[2] Matth. 12. verſ. 10, 12. Marc. 3. verſ 4. Luc. 6. verſ 9.
[3] Luc. 13. v. 15. Luc. 14 verſ. 5.

If our parents, to whome wee doe owe and (perhappes) haue alſo ſworne *honour* and *obedience*; ſhall command any[4] vnlawfull or diſhoneſt thing, as to betray our *Prince* and *Country*, *&c.* it is aſſured, that in not performance hereof, it may and ought to be declared, neither Gods commaundement nor our oathes, to be thereby violated. Though a Iudge ſhould ſweare, to accept euermore (in iudgement) of the depoſitions of two witneſſes, produced for proofe of any matter, ſo they be not excepted againſt iuſtly by the aduerſe partie: according to that ſaying of our *Sauior Chriſt*; *In the mouth of two or three witneſſes euery word ſhal be eſtabliſhed:* Neuertheleſſe, if according to direction of mans[5] *poſitiue* lawe in this behalfe; he ſhall reiect the teſtimony of *children*, being but tenne or twelue yeeres of age; it may and ought to be declared, that herein he doth not offend againſt the oathe by him taken.

[4] l. Lucius. ff. de cod & Demonſt. L. nepos. ſt. de verbis ſignific. L. filius. ff. de cond. inſtitut.
[5] Iuſt. de Teſtam. §. 1. c. relatum & c. cum eſſes ex. d. tit.

The like is true of any oath in generall, becauſe the commandement of God, for performance thereof, is not ſo[6] *peremptorie*, that it doeth binde vs to doe any thing, which is in it ſelfe wicked: for *non*[7] *eſt obligatorium contra bonos mores præſtitum iuramentum.*

[6] L. non dubium. C. de legibus.
[7] c. non eſt. de reg. iuris in 6.

The like may be ſaide of ſundrie *lawes of nature*: wherein this kinde of *diſpenſation by interpretation* hath place; no leſſe then in the former: and are needeleſſe, to be further here exemplified.

Touching the ſecond member of the matters of *Promiſſorie oathes*, viz. whereby an oath is taken for a fuller confirmation of that, whereunto we are alſo bound by *poſitiue lawe*: it is much more aſſured, that according to the ſecond acception of *diſpenſation*; ſuch oathe may be *interpreted* and *declared* not to binde; where, indeede it ought not, by the true meaning of the Lawe; howſoeuer the *generalitie*, or *pregnancie* of the wordes, may ſtrongly (perhappes) ſeeme to weigh vnto the contrary.

Yea and in the firſt ſenſe, a *diſpenſation* of *relaxation* by a *Soueraigne Prince* or other thereunto auᵭhorized may be graunted; for releaſe of an oathe, made in performance of ſome *poſitiue* lawe. But this is onely by way of abrogating ſuch Lawe or

Statute; either altogether, or as towardes that perſon, or for ſome particular action and time; and not, by way of *releaſing* the very *bond of the oathe*, which is not ſubiect to mans power. For when ſuch Lawe or Statute is diſanulled and gone (as locall Statutes of *Colledges* &c. may bee euen heere in *Englande*) then the Oathe made vnto them, as vnto Lawes or Statutes; muſt needes (withall) ſo farre ceaſe, and be releaſed.

When the matter is ſuch, as for performance whereof (otherwiſe then by our *voluntarie oathe* taken) we no way ſtoode bounde, whether it bee in Actions *Religious* or *Ciuill*: the bonde of our Oathe (if in verie trueth, wee did at firſt, *in foro poli* ſtande tyed) may not by anie man bee *releaſed*. Neuertheleſſe a *diſpenſation of true interpretation*, hath place in this very eſpecially, and ſuch *interpretation* may bee needefull, ſometimes in reſpect of the very *matter promiſed by Oathe* to bee performed, being (indeede) no due matter for an oathe. As the oathe for ſingle life, vowed by ſuch, as haue not the ſpeciall gift of *Continencie*. Sometimes it may bee requiſite, in reſpect of *after-euents*: as if I ſweare and vowe to God, to keepe ſome certaine ſpare and ſo ſtraite a diet; as (through weakeneſſe and infirmities after happening) I can not poſſiblie obſerue, without apparent daunger of the loſſe of my life.

And ſometimes, this kinde of *diſpenſation* may haue neceſſarie place; whereas ſome thing doth after fall out, or (at leaſt) is diſcouered; which I neuer forethought, or if I had, by all probabilitie, I woulde neuer haue vowed or vndertaken ſo much. Examples of theſe you may frame many, out of that, which hath beene anſwered to that queſtion; whether all *promiſſorie oathes*, were abſolutely to be kept, or no?

Laſtly, ſome doubt may be ſtirred; whether a *Chriſtian* may capitulate or contracte, (by *mutuall oathes* giuen and taken) with a *Pagan* or heathen *Prince*, or other priuate perſon, that taketh his oathe by *Idoles* or by *falſe gods*: ſeeing in ſo ſwearing, hee ſinneth greatly, in that hee giueth (thereby) that reuerence vnto them, which is onely due, to the true and euerliuing God?

This

This verie queſtion was asked of Saint [1] *Auguſtine* by *Publicola*: and hee did thus anſwere him: *hee that vſeth* (ſayeth he) *the credite of him that ſweareth by falſe gods, not vnto euill, but vnto good: hee doeth not communicate with that ſinne of ſwearing by Diuelles: but is partie onelie to thoſe lawfull couenants, wherein the other perfourmeth, what hee ſware. Yet if a Chriſtian ſhoulde (anyway) induce or drawe an other to ſweare by them, heerein hee ſhoulde ſinne grieuouſly.* And leaſt any man weigh this learned fathers iudgement heerein ouer light, wee haue alſo an example heereof in *Scripture*, and vncontrolled: for [2] *Iacob* tooke an oathe of *Laban*, ſwearing by the God of *Nachor*. Nowe we [3] reade in Scripture, that this *Nachor* was an Idolater, and ſerued ſtrange gods. Hitherto of ſome doubts that may be mooued touching oathes.

[1] Aug. ep. 154. ad Publicolam.

[2] Geneſ. 31. verſ. 53.

[3] Ioſh. 24. verſ. 2.

CHAP. III.

Diuiſion of Oaths according to the outward forme of taking them: according to the matter and inward forme of them: with plaine deſcription of euery kinde of oathe.

NExt followeth to bee diſcuſſed howe manie ſortes, and ſeuerall kindes of oathes there bee; and howe they differ one from another.

An Oathe, as touching the *outwarde forme* of taking it; is eyther *verbally* or *corporally* taken. *Verball*, when by wordes or ſpeeche onelie, wee conceiue the forme of the Oathe; as, *God is my witneſſe; The Lorde liueth, &c. Corporall*, when by ſome outward geſture or acte in taking the Oathe; wee teſtifie that wee accept of it, as it is miniſtred. as, by laying hande on a booke, on our breaſt, or vnder the thigh of him that miniſtreth it: as *Abrahams* ſeruant did.

Againe, ſome oathe is *ſolenne iuramentum*; and others be not. that *oath* is called [4] *ſolenne*, which hath certain ſolēnities preſcribed and endited, either by the *parties* thēſelues, by the Iudge, or by

[4] L. 3. & 5. l. in fine & 34. §. qui iuſiurandum. ff. de iureiurando.

by the *Lawe*, with certaine ſet-conceiued wordes, from which he that ſweareth, may not vary. but if hee doe, his Oath ſhall not be accepted.

All theſe may be giuen and taken, in two ſeuerall ſortes. Either ſimply; as thus: *I ſpeake it before God &c.* or with ſome *imprecation* to our ſelues, or others, whome wee holde very deare vnto vs, adioyned thereunto; as thus: *So and ſo* [1] *do God vnto me and more*. for thereby wee doe expreſly as it were deuote, and binde our ſelues or them, vnto the puniſhment of God; if that be not true, which wee ſweare. Of this kinde I finde examples in *Scripture*, that [2] ſome were ſo impoſed by *Magiſtrates*; and [3] otherſome were *voluntarily* ſo taken. The examples of them both, you may ſee in their ſeuerall places according to the directions giuen by quotations in the margent. An example of an oathe taken *voluntarily by imprecation*, wee alſo finde in the [4] *new Teſtament*: for *Paul* ſaieth, *I call God to witneſſe vnto my ſoule*; which is to execrate his owne ſoule, if he had not ſworne truely. So much of the *outward forme* of an oath.

[1] 1. Reg. ca. 3.

[2] 1. Sam. 14. verſ. 24. Neh. 5. verſ. 12, 13.

[3] 1. Sam. 14. verſ. 44. 1. Sam. 20. verſ. 13. 2. Sam. 3. verſ. 9, 35. 2 Samu. 19. verſ. 13. Neh. 10. verſ. 29.

[4] 2. Cor. 1, ver. 23

There are beſides that, two principall *diuiſions* of an oath: the one reſpecting the *matter* of it, according to the *circumſtance* of *time*; the other, which conſidereth the *inward forme, with other circumſtances*. For the firſt, euery *oath*, is either *concerning a thing paſt or preſent*: and this is called *Aſſertorium iuramentum*: or elſe touching a thing *to come*, and it is called *Iuramentum promiſſorium*. For the ſecond *diuiſion*; an oath may be made, either *iudicially* or *extraiudicially*. And both theſe (in *oathes promiſſorie*) are either *Confirmatoria actus futuri*; as (*in iudgement*) that I will vſe no vaine *cauillations* and *delayes*: or foorth of Iudgement, as an *oathe of alleageance*: or they are *obligationis introductoria*, when the very oath worketh the *bond* in lawe, for ſomething (afterward) to be done.

But this *bonde* is only by the [5] *Canon*, and not by the *Ciuill* lawes, ſauing in one caſe that I can call to minde: which is the [6] oathe of a man once a *bondſlaue*, and now ſet free (called *libertus*) that is made vnto his *patron*, to performe ſome *workes* or other thing vnto him. For in this caſe, the very *oathe* is *obligationis introductorium*: and maketh the *freed man* bound (by that Law) to performe it, *in vim iuramenti*.

[5] Tot. tit. ex. de Iureiurando.

[6] L. vt iuriſiurādi. ff. de operis libertorum.

Further-

Furthermore a *promiſſorie oath* (whether taken *in iudgement* or out *of iudgement*) is either *neceſſarie*; as when it is impoſed by the *Magiſtrate* vpon his *ſubiect*: or it is *voluntarie*.

An oath *aſſertorie* (being of chiefeſt vſe, and therefore moſt to be ſtood vpon and explaned) is alſo either *extraiudiciall* or *iudiciall*. and both theſe, be either *neceſſary*, or *voluntarie*.

The *iudiciall neceſſarie* oath *Aſſertory* is ſometimes giuen to the defendant when there is (formally) another *partie* beſides in iudgement; & ſometimes, when there is no ſuch *partie* beſide; but the *Iudge* that proceedeth *ex officio*. When there is a *partie*, it is either *iuramentum calumniæ*, *veritatis* or *purgationis*: but if there be no ſuch *partie* beſide; it is either *purgatorium tantum*, or *partim purgatorium & partim inquiſitorium*.

The *Iudiciall* and *voluntarie* oath; is either *ſuppletorium*, *eſtimatorium in litem*, or *deciſorium*. Which laſt, is oftentimes confounded with *iudiciale iuramentum*, without further addition: by reaſon of the more frequent vſe of it, in *Ciuill* lawe courts in elder times; when men durſt truſt one anothers conſcience better, then nowe (generally) they haue cauſe to doe.

The *deciſory* oath, is either *delatum* or *relatum* by the one of the parties, that are in ſute together.

Nowe I minde briefly and plainely (without tying my ſelfe to any exact *definitions*) to deſcribe theſe vnto you; with onely quotations of the *Scripture* (where examples of them may be found as I conceiue it) for auoyding of tediouſneſſe, by particular rehearſall.

[1] *Aſſertorie is, when (by oath) any thing paſt or preſent, is affirmed or denyed to be.*

A [2] *Promiſſorie oath* is, when any thing is (by oath) promiſed to be done, or not done.

In a *Promiſſorie oath*, there is a double bond before God: the one is, that it is *ſinne*, if *trueth* be wanting: and the other is, that he is bound to doe that, which he promiſeth. But in an *Aſſertorie* oath, there is no bond, but onely this; that the matter be true, which is affirmed thereby, or denyed.

The effect of a *Promiſſorie oath is*, that he is bound to make that true, which he hath ſworne: but if it were not in his power to doe it; then there wanted in ſuch oath, *iudgement* and *diſcretion*;

[1] Gen. 43. v. 3.
1. Sam. 25. v. 26.
1. Sa. 26. v. 10, 16.
1. Sam. 29. v. 6.
2. Sam. 4. v. 9.
2. Sam. 19. v. 7.

[2] Gen. 24. v. 3. & 9. Gen. 47. v. 31.
Leuit. 5. v. 4.
Num. 30. v. 3. & 14.
Ioſh. 1. v 6.
Ioſh. 2. v. 12.
Ioſh. 2. v. 22.
Ioſh. 9. v. 15. 18. 19. 20.
Iudg 15. v. 12.
1. Sam. 14. v. 45.
1. Sam. 28. v. 10.
2. Sam. 3. v. 35.
2. Sam. 19. v. 13.
1. Reg. 1. v. 13. & 17.

tion; except it were in his power to doe it when he ſwore, but became impoſſible by ſome *caſuall euent* after happening, that could not be before thought on. In which caſe neuertheleſſe, hee is bound to perfourme it, as farre forth as lyeth any way in him, ſo the oath be ſuch, which did binde, as carying with it none *impietie*.

But if the *promiſſorie oath* be made touching ſuch a thing, as was in his power; yet ſuch as ought not to bee done either becauſe it was in it ſelfe *euill*, or is an *hinderance* or let of ſomething that is good: then in ſuch an oath, *Iuſtice* is wanting.

[1] Gen.21.v.31. Gen.26.v.31. Iudg.21.v.1. 1.Sam.19.v.6. 1.Sa.20.v.13.17. 1.Sam.30.v.15. 2.Sam.19.v.23. 2.Sam.21.v.17. 1.Reg.1.v.29. 30.51. 1.Reg.2.v.8.23. 24. 2.Reg.25.v.24. 2.Chro.15.v.14. Nehe.7.v.18. Nehe.10.v.29. Ierem.38.v.16. Ierem.40.v.9. Hebr.6.v.16. & 17.

An [1] *oathe promiſſorie and confirmatorie, is; when it is made for more full aſſurance, of ſome act to be done, or not to bee done.*

A [2] *neceſſarie* oath *(generally)* whether there be two *parties formally*; or the *Iudge* proceedeth *ex officio*; is *that, which a Magiſtrate cauſeth thoſe that be vnder his authoritie to take, for ſome conuenient purpoſe and ende.*

[2] 1.Sam.14.v.24. & 28. 2.Sa.24.v.22.23. 1.Reg.2.v.42.43. Ezra 10.v.5. Nehe.5.v.12. Ioſh.23.v.7. In theſe wordes: *Nor cauſe to ſweare by them.*

In law it is defined to be [3] ſuch, *as you neither may referre or put ouer to the other partie, to take his oath to the contrarie: nor yet may be refuſed by your ſelfe. For if you doe, you ſhall be holden as conuicted, and the ſute muſt goe againſt you.*

This *neceſſarie* oath, is tendered by the *Iudge*, whenſoeuer hee ſeeth cauſe *in equitie* to mooue him; albeit no *partie* make petition: and then it is called *Nobile vel merum Iudicis officium*. or els it is tendered and miniſtered by him, at the petition of a *partie*: and then it is termed *mercenarium Iudicis officium*, becauſe thereby hee ſeemeth, but as it were to ſerue his turne, that maketh the petition.

[3] Poſtilla in v. iureiur. L. in bonæ fidei C. de reb. cred. & iureiur. 9 L.11. § quitauit. ff. de interrog. act. & L.11. de petiurio. ff. de in litem iurando. ibi, *ex neceſſitate.*

The firſt of this *neceſſarie* ſort, where there bee *(formallie)* two *parties*; is *Iuramentum calumniæ*. which is, when one is vrged to ſweare, that hee moues a cauſe, alledgeth or anſwereth ſome *Iudiciall* matter, *bona fide*, that is truely, directly, and not *captionſly*: and that he beleeues it to be true: and thinkes he can (indeede) make proofe of it: and that hee doeth it not to vexe his aduerſary, but to relieue himſelfe: and not of any purpoſe, to delay the ſute.

[3] Maſcard. de probat. vol. 1. pag. 18. nu. 6.

Neceſſarium iuramentum veritatis is [3] *that; which is miniſtred*

to

to witnesses: and that also which is ministred to the partie, who is to answere vnto Positions or Articles: And that also is so called, whereby the Iudge doeth interrogate and examine either of the parties or the witnesses; to the intent, to bee more fully instructed in the cause.

[1] *Iuramentum purgationis* (where there be such *parties*) is; when in a cause *criminally* mooued by some *accuser* or *partie*, the *Iudge* (vpon defect of sufficient proofe) doeth tender to the *defendant* an *oath* to cleare himselfe. This, though it be established by the *Canon*; yet of long time it hath bene in vse aswell in *Ciuill* or *Temporall* courts (on the other side of the Sea) as in *Ecclesiasticall*: so that if the *defendant* shall refuse to take it in either; he is holden *pro confesso, & convicto*. [1] 1. Reg. 8. v. 31.

The other oath of *purgation or clearing simply*, when there is no *formall partie* in iudgement, besides the *defendant*; is that, which (by reason of *fame, scandall, vehement presumption*, or vpon some other of those meanes that (as I haue shewed afore) doe open a way to *Enquirie ex officio*) the *Iudge* doeth giue vnto the *defendant*, to his clearing of the very *crime* obiected: without any meaning then to seeke further proofes of that crime, after the defendant hath taken such oath.

The other oath *necessarie*, being partly of [2] *clearing*, and partly of *further enquirie* is that; which (as is next aforesayd) is giuen to the defendant vpon criminall matter obiected and vpon the circumstances thereof: yea (oftentimes) with purpose to make further proofe, in case the defendant shall not confesse it, or not so fully in materiall circumstances, as the Iudge hath cause to thinke, may by witnesses or otherwise be prooued. Yet if he shall confesse so farre, as is thought may bee prooued; then (according to the qualitie of such his answere) hee is presently either proceeded with thereupon vnto a iudgement, or else dismissed as *cleared* thereof, by his *oath*. [2] Leuit. 5. v. 1. Num. 5. v. 12. & sic deinceps. Iosh. 7. v. 19. 1. Sam. 14. v. 43.

The examples and other iustification hereof, shall more largely (God willing) be shewed, in their proper place hereafter. For this is the oath, that the *Innouators* doe so much condemne, and exclaime against.

But nowe touching *voluntarie Iudiciall oathes*, whereof

Suppletorium is that, which is tendered to the *plaintife* or *defendant* (according to the qualitie of the cauſe) in a *ciuill* matter, for ſupply of proofe, made *ſemiplenè tantùm*: as (happily) by one ſingular witnes, being without all iuſt exception.

[1] L.1. cum l. ſequ. ff. de iuſtitia in iurando.

Iuramentum in litem, or *Æſtimatorium* is then [1] giuen by the *Iudge*; when the *defendant* doeth not reſtore the very thing that is in demaund. in which reſpect he is to be condemned in the value thereof, according to ſuch rate, as the *plaintife* is endamaged, taking it vpon his *oath*: yet ſo, as the *Iudge* (by equitie) may taxe and moderate the quantitie of the ſumme, which he may not exceede; and alſo when the partie hath ſworne, the Iudge may defalke thereof, as he ſeeth cauſe in *equitie*.

[2] Exod.22.v.11. 2.Reg.8.v.31. Hebr.6.v.16.

Deciſorium iuramentum delatum is that; which [2] either the one or the other of the *parties*, firſt offereth vnto his aduerſarie to take, according to that hee affirmeth or ſtandeth in. perhaps vpon confidence of his good conſcience, or for want of better proofe.

So that, if he to whom it is ſo *deferred*, ſhall take ſuch oath: then muſt the matter be adiudged, according to his oath; as if the parties, had ſo agreed the cauſe. But if he ſhall refuſe it, and yet will not *referre* it, that is, will not put it ouer vnto his oath; that firſt made the offer: then ſhall hee be ouerthrowen in the cauſe. So that to *referre an oath*, is nothing els; but to offer it backe; to be decided by his oath (according to his owne iſſue) that firſt made the offer. [3] But if vpon ſuch *referring* it ouer backe againe, he alſo that made the firſt offer, will not take the oath: then hee that ſo *referred* it ouer againe, ſhall haue iudgement paſſe with him, as if he himſelfe had ſworne, when it was firſt offered him: for *maxima turpitudinis eſt, nec delatum ſubire, nec referre iuramentum.*

[3] L. Iuſiurandum. 34. § ait Prætor. ff. eodem. & l generaliter. 12. § ſed iuramento. C.d.

Examples of theſe *deciſorie* oathes, there be alſo at the *common lawe*: for, [4] *where the defendant deſires that the plaintife may be examined or ſworne; this is peremptorie to the plaintife in this point: and ſo is the wager of lawe ex parte defendentis. By the cuſtome of London, if the defendant deſire to haue the plaintife ſweare to his declaration, and hee dos it, the defendant is thereupon condemned.*

[4] 19.H.6.43.

But this oathe *deciſorie* (at the [5] *ciuil* Law) *is neuer vſed in matters*

[5] Iul. Clarus. li. 5. § finali. qu. 63.

ters criminall, except they be mooued ciuilly (not criminally) that is for the plaintifes priuate amends and ſatisfaction: or elſe the cauſe be but of ſmall value: or the proceeding in ſuch criminall cauſe criminally; be referred and intended, to no corporall, but to a pecuniarie punishment or fine onely. Thus farre for a generall vnderſtanding of the nature of euery ſeuerall kinde of oathe.

CHAP. IIII.

That the ceremonies vſed in taking and giuing corporall oathes, with laying handes vpon the Bible or Teſtament, and ſwearing by the contents of it, are not vnlawfull.

THe firſt challenge (nowe comming to be ſpoken of) that is made by ſome of them againſt the *ceremonie* vſed through this Realme in all *corporall oathes* taken either in Temporall or in Eccleſiaſticall Courts; *is the laying of our hands vpon a booke*, when we take the oathe.

For the better approbation hereof, it is meete to conſider the generall ende of it, the particular vſe of it, and the generall practiſe of that or of the like ceremony, reported both in *Scripture*, and in other writers to haue bene vſed in ſuch action.

The generall and chiefe ende of this, or of any the like ceremony vſed in this action, is to ſignifie thereby, that we do then aduiſedly attend, and giue heede to the oath wherewith we are charged, and that we do accept of it, and bind our ſelues in ſort as it is giuen.

The vſe of this in particular; is to ſtrike a more aduiſed feare & reuerence into vs: when wee conſider the reuerence due to an oathe, as it is deſcribed in that booke; & the curſes there threatned againſt thoſe, that forſweare themſelues, or ſhall take the *name of God* vainely.

This vſe of ſuch corporall ceremonie in taking of an oathe is touched in the [1] *ciuil* law, out of which it is gathered; that, *by touching and by corporall taking of it, the oath is holden to be more inuiolable, and the harder (vpon any plea) to be recalled.*

[1] L. 3. C. ſi minor ſe maiorem dixerit.

The practiſe of *corporall oathes*, taken with ſome like effectuall

and ſignificant *ceremonie* by the godly; is to be found in *Scripture*. When [1] *Abraham* cauſed his ſeruant (that was vnder his authoritie) to take a *corporall, Promiſſorie and neceſſarie oath*, for the finding out and fetching of a wife for his ſonne *Iſaac* of his owne kindred; hee willed him to *lay his hand vnder his thigh*. with this ceremonie likewiſe [2] did *Iacob* take an oath of his ſonne *Ioſeph*; that hee ſhould not burie him in *Ægypt*; thereby as it were ſignifying, that ſimplie they were to take the oathe, euen as they looked for Saluation in the promiſed *Meſſiah*, that was to deſcend of thoſe two *Patriarkes*, according to the fleſh.

[1] Gen. 24. v. 3. & 9.

[2] Gen. 47. v. 29.

So doeth Saint [3] *Auguſtine* interprete this ceremonie: *The hand* (ſaieth he) *put vnder the thigh did ſignifie, that the Lord* (*according to the fleſhe*) *was to deſcend from that perſon.*

[3] Aug. de ciuit. Dei, lib. 16. ca. 33

Another *ceremonie* (beſides this) we find vſed in holy *Scripture*, when ſuch *corporall* and more *empreſſiue* oathe was taken: and that is the lifting vp of the hand, towards heauen: a geſture ſo commonly vſed, that ſometimes it is taken for the oathe it ſelfe. For *Abraham* [4] *ſayd to the king of Sodome, I haue lift vp my hand vnto the Lorde, the moſt high God, poſſeſſour of heauen and earth, that I will not, &c.* Likewiſe God ſaieth in [5] *Deuteronomie: I lift vp mine hand to heauen and ſay, I liue for euer.* And likewiſe where it is [6] ſayde: *I will bring you into the lande, which I lift vp mine hand* (*id eſt*, ſware) *that I would giue to Abraham, Iſaac, and Iacob.* So the Prophet *Ezechiel: I* [7] *lift vp mine hand vnto them in the wilderneſſe; that I would not bring them into the lande, &c.* That theſe were *oaths* taken with that ſignificant ceremonie, another [8] *Prophet* declareth. *I heard the man clothed in linnen, which was vpon the waters of the Riuer; when hee helde vp his right hand and his left hand vnto heauen, and ſware by him that liueth for euer.* with the ſame pertinent geſture doeth the *Angell* in [9] the *Reuelation ſweare by the liuing God, & lifted vp his hands towards heauen*; where (by immutable prouidence) that was decreed: & from whence commeth ſwift iudgement vpon all, that make or loue leaſings.

[4] Gen. 14. v. 22. 23.

[5] Deut. 32. v. 40.

[6] Exod. 6. v. 7.

[7] Ezech. 20. v. 15

[8] Dan. 12. v. 7.

[9] Apoc. 10. v. 5.

This geſture in taking a *corporall oath* was ſo vſuall, that from the people of God, it ſeemeth to haue bene deriued downe, and taken vp euen with the Gentiles.

[1] *ſequitur*

——[1] *ſequitur ſic deinde Latinus,*
Suſpiciens cælum, tendítq; ad ſydera dextram:
Hæc eadem (Æneа) terram, mare, ſydera, iuro: as *Virgil* writeth. And no leſſe is by ſome thought to be meant in the *Digeſts of the ciuil Lawe*, by the word [2] *emiſſa manus*. Yea, and the practiſe of that very *ceremonie* of ſwearing with laying hand vpon the *holie Goſpels*; was both had, and allowed by the Fathers in the *Primitiue* Church, as appeareth by Saint [3] *Auguſtine* in his Epiſtle *ad Publicolam*.

[1] Virgil. lib. 12 Æneid.

[2] L. quidam. ff. de probationibus.

[3] Aug. ad Publicol. epiſt. 154.

In the times of the ancient *Chriſtian Emperours*, it was receiued and vſed in *Ciuill* Courtes. *An oathe* (ſaieth [4] *Iuſtinian*) *is then ſaide to bee corporally taken; when a man in ſwearing, doeth touch with his hand, the holy Goſpels*. And againe: [5] *Whether the oathe be to be taken in publike iudgement, or in houſes, or in holie Oratories, or with touching the holie Scriptures, &c.* And it is prouided, not [6] onely that they ſhall be taken *tactis ſacroſanctis Euangelijs*: but that [7] *the Scriptures ſhall lie continually before the Iudges ſitting in iudgement; that both they and the ſuters, may bee put in minde; that the iudgement is Gods, and doone in his preſence*. For touching *the holie Goſpels at the taking of an oathe: wee haue other teſtimonies alſo recorded in* [8] *ancient lawes*.

[4] Nouell. Iuſtin. 8. vel 9.

[5] L. generaliter. § in omnibus. C. de rebus credit. & iureiur.

[6] L. rem non nouam. § patroni. C. de iudicijs.

[7] Ibidem ante.

[8] L. 2. C. de iuramento propter calumniam dando. & § 1. & § nulli de ſanctiſſ. ep. in Auth.

So for the laying of *holie Scriptures* before them, at the time of taking oathe, both [9] out of Lawe and *Canons*.

[9] Auth. ſed iudex. C. de epiſcopis & clericis. c. fin. de iuram. calumniæ. Clem. 1. de homicid. Clem. 1. § porrò de hæreticis.

And by the moſt generall cuſtome of all *Chriſtendome*; the ſame *ceremonie* in taking a *corporall oathe*, is vntill this day continued. But it is [10] reported, that *in Italie, they vſe to lay their hand vpon any Booke, Bible, or other*. And it ſeemeth by a [11] *French* Writer, that *they which ſweare there, doe vſe to holde vp their hand towards heauen: thereby ſignifying, that they call God to witneſſe*. In ſome other places they take a *corporall oathe*, by laying their hand on their breaſt.

[10] Panorm. in c. & ſi Chriſtus. de iureiur.

[11] Duarenus in tit. ff. de iureiur. ca. 11.

But where the *Treatiſor* reprehẽdeth at taking an oath a *vaine ceremonie* and *fond inuention* (as he calleth it) *of ſtretching out three middle fingers vpon the booke, & the thombe and little finger vnder it; with ſome myſterie (by him ſuppoſed) thereby to be ſignified*, as if hereby this Church of *England* or preſent regiment therof (which he oppugneth) were therein to bee touched: Truely hee might with leſſe ſhewe of humour, haue ſpared that *vaine and fond inuention*;

inuention; insomuch as no such matter is either by *law* commanded, by *Iudges* vrged, or by any others *practised*.

One other *Ceremonie* or maner of taking an oath, is by some of them also reprehended: that is, for swearing *by the booke*, or *by the contents of it*.

We doe finde in a very old statute of this Realme (termed the *awarde of Kenelworth*) these [1] wordes: *All that haue to doe in this behalfe, shall sweare vpon the holy Gospels of God, that none shall take reuengement, &c. by occasion of the Commotion:* And in the same Statute, not onely *vpon*, but also *by the holy Gospels*. For it is there thus [2] conteined, *Those that haue bene robbers in warres & roades, and haue nothing; shall come and sweare by the holy Gospels of God (finding sufficient suretie) that from hencefoorth they shall keepe the peace, and suffer satisfaction, and penance, after the iudgement of the Church*. where (by the way) may be noted, that it seemeth *Ordinaries* then did, and might enioyne *penance* and satisfaction to parties delinquent; for wrongs done by them, in temporal *goods* and *chattels*.

[1] 51. Hen. 3.

[2] Ibidem.

The maner of swearing *by the* [3] *contents of the Booke*, is prescribed to bee vsed in the *oath* of the *Queenes supremacie*. But is this the onely cause (thinke yee) that some of that suite, refuse wholy to take it, or come very hardly vnto it? Some of them mince it, and glose vpon it, and I know not with how many *interpretations, limitations*, and *protestations*, doe (in very deed) take the whole force and true meaning of it away, as deepely as the *Papists* doe, though in other respects.

[3] 3. Eliz. ca. 1.

But it will bee sayd, the *contents of the Booke* be creatures, and therefore not lawfull to sweare by them.

Truely it must be confessed, that simply to sweare by a creature, is [4] forbidden. *Sweare not at all, neither by heauen, &c. nor by earth, &c.* saieth our *Sauiour* in the *Gospell*: which must be vnderstood, to be forbidden in any other creature, as well as in those.

[4] Mat. 5. v. 34. 35. & 36.

The prophet *Esay* saieth: *Hee* [5] *that sweareth in the land, shall sweare by the God of trueth*: *Ieremie* [6] saieth, *How should I spare thee for this; thy children haue forsaken mee and sworne by them that are no gods?* Therefore are they [7] taxed *that sweare by Baall*, and are taught to sweare thus, *the Lord liueth*.

[5] Esay 65. v. 16.

[6] Iere. 5. v. 7.

[7] Iere. 12. v. 16.

Saint *Augustine*, as to this purpose, writeth [8] thus: *The very*

[8] Aug. ad Publicol. epist. 154.

swearing

ſwearing by creatures is euill becauſe it is forbidden by God: but *to keepe that thou ſo ſweareſt is good; that thereby thou may auoyde the ſinnes of lying, and deceipt.* The godly ancient [1] *Martyr Polycarpus*, did rather chooſe to be burned to aſhes, then to ſweare *by the fortune of Ceſar.* [1] Euſeb. lib 4. hiſt. ca. 15.

Saint [2] *Hierome* ſayeth: *He that ſweareth, either worſhippeth or loueth him, by whome he ſweareth.* The *decrees* [3] of *Gratian* do gather the ſame prohibition, againſt ſwearing by creatures; out of ſundrie olde *Fathers*, and *Councels.* [2] Hierom. in 5. Matth. [3] c. & iurabunt. c. conſidera. c. clericum. c. ſi quis per. & c. mouet te. § ſicut etiam. 22. qu. prima.

Swearing is a kinde of religious acte, whereby wee giue worſhip to God, as moſt true, moſt iuſt, and knowing all thinges; and therefore to be taken onely in his name.

Yet (theſe reaſons notwithſtanding) we finde ſundrie examples, of vertuous and godly perſonages in the Scriptures; that haue ſworne by creatures. Firſt it may ſeeme, that *God* himſelfe ſo ſweareth: where it [4] is ſaid, *the Lorde hath ſworne by the excellencie of Iacob.* *Ioſeph* did [5] ſweare thus, *By the life of Pharaoh, ye ſhall not goe hence, except your yongeſt brother come hither.* In the communication and treatie of league betwixt *Dauid* and *Ionathan*, it is ſaid thus: *And Dauid ſware againe, &c. as* [6] *the Lord liueth, and as thy ſoule liueth, there is but a ſtep betwene me & death.* So did *Abigail* [7] ſweare before *Dauid: as the Lord liueth, & as thy ſoule liueth.* The *Patriarch Iacob* at the league betwixt him and *Labã*, ſware, *by the feare of his father* [8] *Iſaac.* And *Vrias* ſware thus vnto king *Dauid*, [9] *as thou liueſt, and thy ſoule liueth.* The like oath doeth *Eliſha* [10] vſe to *Eliah* the Prophet twiſe in one Chapter; *as the Lord liueth, and as thy ſoule liueth, I will not leaue thee.* The *Sunamite* woman ſweareth [11] thus to *Eliſha* the *Prophet; as the Lord liueth, and as thy ſoule liueth, I will not leaue thee.* Saint *Paul* [12] writeth thus: *by our reioycing which I haue in Chriſt Ieſus our Lorde, I die daily.* This doth S. [13] *Auguſtine* affirme, and alſo proue to be an oath in two ſeueral places of his works. And ſo doth [14] *Beda* alſo our countrieman, and an ancient Writer. Which none of theſe holie perſons woulde haue done, or ſuffered in their preſence to be done; if it had beene either *idolatrous* or *blaſphemous.* [4] Amos. 8. ver. 7. [5] Gene. 42. V. 15. [6] 1. Sam. 20. V. 5. [7] 1. Sam. 25. verſ. 26. [8] Gen 31. verſ. 53 [9] 2. Sam. 11. verſ. 11. [10] 2. Reg. ca. 2. verſ. 3. & 6. [11] 2. Reg. ca. 4. verſ. 30. [12] 1. Cor. 15. verſ. 31. [13] Aug. in 1. ca. ad Galatas. & ſer. 30. de verbis Apoſtoli. [14] Beda in 1. Cor. ca. 15.

In the times of the *Primitiue* Church; we find records of this forme of oath taken, viz. *by the holy Goſpels.* Saint [15] *Auguſtine* ſaieth, *It is a greater matter to ſweare by God, then to ſweare by the* [15] Aug. ad Publicol. epiſt. 154.

Gospels. which prooueth, that this forme of Oathe was then in vse, and that without reprehension. But Saint [1] *Chrysostome* more fullie: *If* (saieth hee) *there bee any cause at all, it is counted but a light matter to sweare by God: but hee that sweareth by the Gospelles, is thought to haue doone a farre greater matter: to whome must bee saide, Yee fooles, the Scriptures were made for God, not God for the Scriptures*. The same *ancient Father* elsewhere also noteth, that manner of *ceremonie* to haue beene vsed in his time, in taking *corporall oathes:* whereas going about to reclaime men from that vsuall deferring of *decisorie oathes* vnto others; hee [2] thus saieth: *At least* (sayeth hee) *if nothing else will moone thee, haue a reuerend regarde of the very Booke, which thou reacheſt to him to sweare by; and peruse but the Gospell which thou takeſt in thine handes, and vrgeſt him to sweare by, &c.*

[1] Chrysost. Hom. 44. in Matth. in opere imperfecto.

[2] Chrys. Hom. 15. ad pop. Antioch.

Ancient *Christian Emperours* did set downe by lawe; that this forme of oath should be [3] vsed. viz. *by God Almightie the Father, Sonne, and holy Ghost, &c. and by the foure Gospels, that I do hold in mine hand*. And other *Emperours* (afore) [4] allowed euen of this kinde of oath: *per salutem principis*.

[3] Iustinian. Nou. Coll. 2. const. 3.

[4] Arcad. & Honorius A. A. l. 41. C. de transactionibus. anno Christi 395.

For resolution of this doubt, I cannot disallow of the *Schoolemens* answere, that whether the *oathe* be *expresly* by God, or by *implication*, it is not materiall; so that wee doe not sweare simply by the *creature*. Now there is no man so full of cauill, who wil conceiue when we sweare to the oathe of *Supremacie* thus: *So God helpe vs, and by the contents of the booke*, or, *By the holy Gospels*; that thereby we sweare, either by the couer, paper, inke, or forme of letters; but rather by the *wisedome* and *spirit* of God, by which it was indited: and withall, as it were renouncing all the promisses, and calling vpon vs all the curses therein made, if wee sweare not truely. Therefore ([5] say they) there is *relatio ad Deum actualis* in an oathe, when both in words and meaning wee sweare by him: and when wee sweare by some excellent creature, not simply, but in respect as there shineth in it a great measure of *diuine trueth*, or *Maiestie*, then it is called *relatio habitudinalis ad Deum*, a secret implied reference to God himselfe. For as the good that is doone to a Prophet, or Disciple, in the name of a Prophet or Disciple; and the despite that is done to them, or

[5] Bonauentura. Angel. de Clauasio, & alij.

vnto

vnto the poore, redoundeth vnto *God* his Creator, and is ſaide in Scripture to be doone vnto God himſelfe: So when we ſweare by a *creature*, with an eſpeciall reference to *God the Creator*: it is intended (indeede) as doone by him, and in his holy name.

This their diſtinction ſeemeth well confirmed by ſome of the places before alledged. Where God is ſaide to ſweare by *the excellencie* of *Iacob*; it cannot bee vnderſtoode, that it was by any worldly *excellencie*, wherein *Iacob* excelled; but (indeede) was by himſelfe, as thoſe wordes to the [1] *Hebrues* doe teſtifie: *becauſe God had no greater to ſweare by, hee ſware by himſelfe. Iacobs* oathe to *Laban*, was not by any accidentall conceipt or paſſion of his father *Iſaacs* minde: but by the very *obiect* of his religious feare, that is by *God* himſelfe. [1] Heb. 6. ver. 13.

In like ſort, thoſe oaths *by the life of the ſoule* of ſuch as they ſpake vnto, and that which was by *Paules reioycing*; muſt needes be vnderſtoode. For the oathe which [2] *Dauid* ſware vnto *Ionathan*, *as God liueth, and as thy ſoule liueth*; is (after) in the [3] ſame Chapter ſaide to bee *ſworne, in the name of the Lorde*. [2] 1. Sam. 20. ver. 3. [3] Ibidem. ver. 42.

Therefore where *Ioſeph* ſware by the life of *Pharaoh*, it may not be taken as if hee meant (without any reference to God) to ſweare *ſimply by a creature*; but it was either by way of *denoting*, and as it were binding of the Princes life vnto God; a thing which (thereby) hee ſignified to them, that he helde moſt deere vnto him: or elſe by way of *conteſting*, and calling to teſtimonie the truth of *diuine Iuſtice*; for execution wherof, the Princes of the earth are ſet: as ſome of the *Schoolemen* do anſwere it.

Saint [4] *Chryſoſtome* doth make the ſwearing by the Goſpels equiualent with the oath, that is made by *God* himſelfe; where he confuteth the opinion of ſuch, as thought it to be a greater matter to ſweare *by the Goſpels*, then it was to ſware *by God*. In which regarde a [5] *Canoniſt* ſayeth: *paria ſunt iurare per Deum, ac per ſidem. Tyndall* our countryman (in this behalfe) well [6] interpreteth the meaning of an oathe, made *by the holy Goſpels: when thou ſweareſt* (ſaith he) *by the Goſpell booke, or Bible, the meaning is, that God, if thou lie, ſhall not fulfill vnto thee the promiſes of mercy therein written: but contrariwiſe to bring vpon thee all the curſes, plagues, and vengeance therein threatned, vnto the diſobedient and euill doers.* [4] Hom. 44. oper. imperfect. in Mat. [5] Innoc. in c. etſi Chr. de iureiur. [6] Tyndall in 5. Matth. pag. 208. ſuorum operum.

And when the name of a *creature* (in which no ſuch meaſure of *diuine maieſty* ſhineth, as doeth in the *holie Scriptures*) is vſed in an *oathe*; it is vnderſtoode to bee doone with this *reference* vnto Almighty God, whereof wee doe ſpeake by Saint [1] *Auguſtines* iudgement. *What is it* (ſaieth hee) *to ſweare by God, but, Ius reddere Deo, to doe right to God? when thou ſweareſt by thine owne health or ſaluation, but to doe right to them?* But more fully and plainely afterward: *When* [2] *a man ſaith thus; by mine health or ſalnation, hee bindeth and gageth that vnto God: when by his children, hee pledgeth them vnto God; that what hee ſpeaketh may fall vpon their heades: if true, then trueth; if falſe, then falſhoode. Nowe ſeeing whatſoeuer a man in ſwearing nameth, whether his children, his owne head, or his ſaluation, hee bindeth it thereby vnto God; then howe much more doeth hee it, when hee falſely ſweareth by God himſelfe?* Yea when farre more meane creatures then theſe be named in an oathe, yet the ſame *reference* vnto *God*, is taken to be reteined. For the ſame learned [3] Father ſaith: *Lo I tell you, that he which by a ſtone ſweareth falſely, is periured: whereupon I inferre, that many are deceiued, who thinke in that the thing by which they ſweare, is of no value; therefore they are not guiltie of periurie:* truely in this caſe *thou art altogether periured, in that thou ſweareſt falſely, by that thou takeſt not to be holy: if thou thinke the thing it ſelfe not to be holie; yet account him holie, to whome in that ſorte thou ſweareſt: for when thou ſo ſweareſt, thou doeſt not ſweare to thy ſelfe or vnto a ſtone, but thou ſweareſt to thy neighbour, thou ſweareſt to a man before a ſtone; but doeſt thou not alſo ſweare before God? and albeit the ſtone doe not heare thy words, yet God will puniſh thy falſehoode.* And *Tyndall* in the [4] aforeſaide place to like effect: *When* (ſaieth hee) *thou ſweareſt by any creature, as by bread or ſalte, the meaning is, that thou deſireſt; that the Creator thereof, ſhall auenge it of thee, if thou lie.* *Vlpianus*, though a great Lawyer, yet but an *Heathen* man coulde ſee this meaning to bee in ſuch oathes: viz. both that wee ought to ſweare by *God*; and that if our oathe were conceiued by anie creature; yet it hath (for the moſt parte) a reſpect vnto God, and thereby bindes, as if it were made by God himſelfe. [5] *Qui per ſalutem ſuam iurat* (ſayeth he) *per Deum iurare videtur; reſpectu enim Diuini numinis ita iurat.* Whereupon a great learned

[1] Aug. de verbis Apoſtoli. Ser. 28. ca. 6.

[2] Ibidem.

[3] Aug. ibidem. ſer. 28. ca. 12. ſed ſecundùm alios libros Ser. 30.

[4] Tynd. in 5. Matth. pag. 208.

[5] L. 33. Qui per ſalutem. ff. de iureiurando.

ned man of [1] late yeeres gathereth thus: *whoſoeuer ſweareth, albeit he make no mention of God, yet is he entended to denote and ſubiect himſelfe to the vengeance of God, if willingly he deceiue.* And other Heathens (though they named oftentimes ſomething els which they helde deare vnto them, in taking their *oathes*) yet, by the light of nature could ſee thus much; that an oath was an honour proper to the *euerliuing God.* Therefore [2] *Apuleius* writeth thus: *vtrumq; idoneum non eſt, per quod adiures vtue per iſta iurent, cum ſit ſummi Deorum hic honor proprius:* which he prooueth out of *Ennius* (as [3] *Lipſius* doeth reade it) in theſe wordes: *Nam & Iouis iurandum dicitur, vt ait Ennius.* The verſe which he meaneth, is alleaged by *Tully:*

Fides alma, apta pennis, iurandum Iouis.

The ſame *etymologie* (*of Iuſiurandum quaſi Iouis iurandum*) doeth *Lipſius* in the ſame place alſo prooue, out of this verſe of *Nauius;*

Ius ſacratum, Iouis iurandum ſagmine.

So that we may conclude, if the contents of the holy *Bible* were to be accounted (in eche reſpect) but a creature; yet with ſuch regarde, and *neceſſarie reference* that it hath to God himſelfe; it is neither vnuſuall, nor vnlawfull. Thus much for the two opinions deliuered againſt the *ceremonie* in taking, and maner of *charging* by oathe.

[1] Duarenus in tit. de iureiurando.

[2] Apuleius de Deo Socratis.

[3] Lipſius l. b. r. Elector, ca. 18.

CHAP. V.

The true iſſue of the next opinion in queſtion: two ſortes of crimes and offences prohibited: in what caſes an oath (here ſpoken of) may not be miniſtred: and the manifolde conueniencie and neceſſitie of an oath (ſometimes) to be miniſtred in a cauſe criminall *and penall vnto the partie: with ſome fewe obiections, touching inconueniencie thereof, anſwered.*

NOwe followeth the moſt principall chalenge by this ſort of men. and it is that, which they make againſt ſuch oath, as I termed afore, an *oath of purgation* and of *Enquirie*. which is, when a *Iudge* hauing ſome one or mo of thoſe grounds treated of, and prooued afore ſufficient

ent (in equitie and lawe) to ground an *Enquirie ex officio* against a crime; doeth (accordingly) proceede, and vrgeth the partie conuented, to answere the matter and circumstances (whereon the *Enquirie* to the ende of *Purgation*, or els to punishment and reformation is framed) vpon his *corporall oath*; though the matter be *criminall*, & thereby may happen to be *penall* to him selfe, and perhaps vnto others also.

Nowe whether such oath may by a Magistrate lawfully be vrged, and therefore not to be refused by the partie; is the very issue of this question.

Crimes and offenses are of two sortes: they are either *prohibita quia mala*, that is, either *mala per se*, in their owne nature wicked, & therfore by lawes forbidden: or such as of their owne nature are not simply euill, but therefore made euill, because (for some publike good ende) they are forbidden by *positiue lawes*. Whether in both these sortes of crimes, those men doe thinke, such oath to bee vnlawfull, or but in the one of them, and in whether of the two; I haue not yet heard any resolution; and therefore will bring my proofes indifferently for either.

But these two *cautions* you must be forewarned of. First, that it is not holden by any Law in *England*, nor by *practise* of any Court here vsed; that a man should be examined vpon his oath, touching a crime, whereby his life or any of his limmes may be endangered. The reason why the lawes thought it vnreasonable to stretch it thus farre, was for feare of *periurie*. becaus it cannot be entended of most men, but they will rather hazarde an vntrue oath; then either their life, or limmes. *Skinne* for [1] *skinne* (sayth *Satan* to God) *and all that euer a man hath, will hee giue for his life.*

[1] Iob 2. V. 4.

And to this very purpose is the same text (not vnaptly) alleaged, euē by the *Treatisor* himself. which maketh me the more to maruell at the *Note-gatherer* (pretending to be both so great *a Diuine & Statesman* also) that he could not see, this to be far the sounder opinion *by diuinitie*; and that he knewe not the policie and custome of this Realme, to concurre also therewith; *howsoeuer he auouche the contrary*, as [2] afore is by me noted.

[2] Part. 2. ca. 10. pag. 93.

The next *caution* is; that if the *Iudge* haue probable cause to suspect the partie to be such one, as will [3] forsweare himselfe, rather

[3] Iul. Clar. lib. 5. § finali. q. 45.

ther then tell a trueth: there he ought alſo to abſtaine from tendring oath vnto him, eſpecially touching *a crime.*

This not onely by lawe is required, but (as ancient Fathers iudge) by *diuinitie* alſo: [1] *quare* (ſayth S. *Auguſtine*) *prouocaſti hominem ad iurationem; quem ſciebas falſum eſſe iuraturum?* why didſt thou prouoke ſuch one to ſweare, as thou kneweſt would ſweare falſely? And [2] againe the ſame learned Father: *he that prouoketh a man to ſweare whom he knoweth will ſweare falſely, is worſe then a man killer: for a man ſlayer killeth but the body, but this man goeth about to kill the ſoule: yea two ſoules; that is, his whome he ſo prouoketh, and his owne ſoule.*

[1] Aug. de decoll. Ioh. Bapt. ſer. 11.

[2] Aug. ibidem.

An example hereof may be of him, which knowing the very trueth, yet *deferreth* an oath *deciſory.* whereas a *Iudge*, though he know it not, but only haue probable ſuſpition, that the partie is like wilfully to periure; ought not to vrge an Oathe at his hands.

In the handling of this oath miniſtred to a partie *ex officio* in a cauſe criminall, and thereby penall to him; I propound this order to my ſelfe. Firſt to diduce downe more largely that equitie (which is afore in the ninth Chapter of the ſecond part ſhewed, to be in the *Enquirie of Office*) vnto this chiefe and moſt vſuall act in ſuch *Enquirie*; that is, of examining the partie by his *corporall oath*, with anſwere to ſome fewe obiections made againſt the equitie and reaſonablenes of it, by the *Treatiſour.* Next I meane to ſhew it to be ſo far from being *contrary* to the lawes of the Realme; that by them it is often vſed and practiſed; with anſwer to ſuch reaſons, as be made to proue the contrarie. Then that the lawes of the Realme, doe allowe it *in Courtes Eccleſiaſticall.* Fourthly, that it is practiſed and allowed by *Canon* and *Ciuill* lawes. And that it is in vſe amongſt other nations, with anſwere likewiſe to obiections made to the contrary. Sixtly, that it is practiſed and allowed in Gods lawe. Laſtly I will (God permitting me) anſwere their obiections, that out of the worde of God and *Diuinitie* I haue heard made, to the contrary. Firſt therfore touching the equity of ſuch oath. All *enquirie* of crimes is made in ſome of theſe three ſortes. Firſt where neither perſon nor any deede is knowen to the *Iudge* (in particular) to be cõmitted; And ſuch are *enquiries* by *grand Iuries* at the common lawe,

lawe, and *Enquiries* by *Churchwardens* and *Sidemen* in *visitations*, at the *Ecclesiasticall* lawe. This is called *Inquisitio generalis*, *Enquirie*, or *Enquest generall.*

Secondly *enquirie* is made, when a fact is knowen to bee done, but the delinquent is not knowen. As the *Inquisition* by a *Coroner* (vpon some murder committed) at the common lawe: and as the *Enquirie* vpon *forgerie* committed in some act of an *Ecclesiasticall* court; in which kinde of *Enquirie*, the hidden person is enquired after, in respect of the apparant fact.

Lastly, *Enquirie* is made against a particular person; where there be presumptions and detections, that some certaine crime is by him committed; but whether he haue committed it or not, it is not certainely knowen: and herein the *crime* being hidden is enquired of, because of the person, apparantly pressed by some probabilities thereof. The second of these is termed also *Inquisitio generalis*, but it is not so generall as the first: and the last, is most properly termed *Inquisitio specialis.*

In the first and second of these sortes of *Enquiring*, it wil not (I take it) be denyed by any; but that such should be assumed (by the seuerall *Iudges* and *Officers* in that behalfe) as they (in their discretions) thinke most fit, and to be most likely to knowe the offendors, and the offenses with their circumstances; and that they be charged vpon their oathes, touching their vtmost knowledge, concerning such Offendors. And may it not then thereby happen and fall out; that an oath shalbe ministered to one, who himselfe is such an offendor as is enquired of? For the *grand Iurie* (as I take it) haue their oath giuen to *enquire*, and *present*, their owne, their fellowes, and others faultes, that they shall haue in charge. And yet to auoyde this inconuenience, I trust it will not be thought meete, that al *Enquiries* by oathes, should be therefore giuen ouer. Then if this be a thing equall and agreeable vnto lawe, to vrge an oath; euen where it may happen the partie that takes it, to be the offendor: why should it not stand with more equitie, to vrge it vpon such an one, as albeit he be particularly detected by great presumptions and probabilities; yet may happen neuertheleſſe to be most cleare from the crime, imputed to him?

Againe, if one of the *grand Iurie* being to be sworne would denie

denie to take the oath, except hee might haue ſome certaine offenſes (vſually giuen in charge) left out and forepriſed ſeuerally out of his oath, leaſt otherwiſe hee ſhould thereby be driuen *to accuſe* himſelfe: or if one ſuppoſed, moſt able to giue *euidence*, and *information* to the *Coroners enqueſt*, vpon a murder committed; ſhould deſire to bee ſpared from telling his vtmoſt knowledge thereof, vpon his oath; leaſt thereby hee bee driuen to accuſe himſelfe: would the *Iudges* or *Officers* hereupon, thinke it reaſonable to ſpare theſe men and let them ſo goe; and not rather repute them to be (in deed) guiltie of thoſe crimes, for which they refuſe to take oath, to tell and diſcouer their knowledges? In like ſort therefore, why ſhould ſuch men, as be probably detected of crimes nothing ſo penall, and who refuſe to take oath to anſwere them, bee iudged by any man to doe it vpon good ground and conſcience? and not rather, that they (as thoſe others) refuſe it, vpon guiltines of their owne conſcien ces?

As the equitie of this oathe is ſhewed by the former comparisons; ſo may it alſo by conſideration of the crimes and the qualitie of them, whereupon it is tendered in courtes *Eccleſiaſticall.*

None of ſuch crimes haue any puniſhment appointed vnto them by the *temporall* lawes of the Realme: and by the *eccleſiaſticall Iuriſdiction* (whereby they onely reſt puniſhable) the penaltie is farre milder then for thoſe *crimes*, and the like, was inflicted by the *Iudiciall* lawe of God, giuen to his peculiar people: yea not to be accounted (in very trueth, and for the moſt part) ſo much a *puniſhment* as a *medicine*, tending to the reformation of the delinquent (principally:) and ſecondarilie to the terrour or ſatiſfaction of others.

Out of this number of *medicinable puniſhments*, I onely do except incorrigible *hereſie*, *Atheiſme*, and *Apoſtacie from Chriſtianitie*: which (for the horrour and danger of them vnto others) *enſe reſecantur, ne pars ſyncera trahatur.* Both theſe three, and the reſt are in ſuch abhomination with Almightie God, ſo manifoldly dangerous to the offenders ſoule, ſo noiſome and preiudiciall to the lawes, and vnto all *ciuill* ſocieties of men in a common wealth: that no well aduiſed man will thinke them meete

to be ſuffered to take roote and growe, but rather by all meanes poſſible to bee diſcouered, and corrected. But being workes of darknes, & by the very remnants of thoſe ſparkes of the knowledge of honeſt and vnhoneſt, iuſt and vniuſt (that continue with vs ſince *Adams* fall) euen by them that commit them, they are cõdemned to be ſuch, as had need to be ſhrowded in all ſecrecie. And therefore they are of that qualitie and nature, as cannot (lightly by any poſſibilitie) be diſcouered, but either by the parties themſelues, or by other partakers with them in the verie crimes; and (thereby) parties alſo to the ſame offences. Yet (as *Tertullian* ſaieth) a malefactor for the moſt part leaueth ſome footeſteps and traces behinde him, which may ſerue to good purpoſe, for his diſcouerie. Whereupon it commeth to paſſe, that preſumptions fall out to be knowen abroad, of great likelihood and probabilitie; that ſuch crimes and offences haue bene committed and done by ſuch a perſon. So that when *great bruites and fames* hereof doe flie abroad to the offence of the godly, to a *ſcandall* and a ſtumbling blocke vnto the weake *Chriſtian*, and to the obloquie of our holy faith and profeſſion, with the common aduerſarie: wee muſt either permit ſuch a ſuppoſed delinquent and thus diſcouered, to bee *examined* by his *oath* touching the crime, and materiall circumſtances of it: or elſe muſt wee ſuffer ſinnes and grieuous enormities (ſo they bee cloſelie committed) to growe vp and take ſtrength without controlment; till they haue gathered that head, that they ſhall bee able euen with their peize and grieuouſneſſe, to ruinate both *Church* and *Common wealth*. which if it bee vnreaſonable and vngodly (all things afore weied) then that whereupon it followeth muſt needs be abſurd alſo.

If in hainous and daungerous crimes to the perſon of the *Prince* or *ſtate* of the kingdome (whereof there be good probabilities and preſumptions agaynſt ſome perſon) it bee holden neceſſarie and lawfull *Policie*; to torture the ſuppoſed delinquents, that they may confeſſe, albeit it bee capitall to themſelues and to others alſo in the higheſt degree: is it not of as great equitie in crimes of no leſſe ſecrecie, and ſome of them in no leſſe execration with *Almightie God* then theſe, to

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vſe the meanes of the parties oath; where no *capitall*, nor (oftentimes) no *corporall*, yea (for the moſt part) where no punishment at all (properly) ſo to be called, but a *correcting* and *reforming* of the partie, is intended?

When there be great preſumptions of complots laied, that are dangerous to the *Prince* and whole *ſtate*: is it holden good *policie*, to let the parties alone (without either *torture* or *examination*) vntill ſome will voluntarilie offer himſelfe to be an *Accuſer*, and to bee able to make proofe of them, though the partie bee neuer once *examined*? I feare mee greatlie, if this were holden for lawe and equitie; ſuch great and ſecrete offences would neuer come to *Iuſtice*, till there were no man to adminiſter it, but the offenders themſelues. And may not then the like be conceiued iuſtlie of crimes ſubiect to *Eccleſiaſticall* cenſure and *Iuriſdiction*?

In the diuiſion of the ſeuerall kindes of *oathes*, there are mentioned certaine, (euen where two parties bee *formally* in iudgement) that be *neceſſarie* to bee taken by the other partie, when as the ſuite is but betwixt two priuate perſons, and touching their owne priuate commoditie and intereſt. They are tendered by the *Iudge* ſometimes at the onely petition of one of the parties, and then it is called *Mercenarium Iudicis officium*, as of more baſe qualitie, in that he doeth nothing, but that, which he is (in ſome ſort as it were) vrged vnto: and ſometimes are offered by the *Iudge* himſelf *ex officio*, without petition of either partie, as in equitie he ſeeth cauſe: and then it is called *Nobile Iudicis officium* (touched alſo afore) as being of a more high and worthie reſpect, and of greater regard.

Of theſe ſortes are *Iuramentum calumniæ, veritatis, & Purgationis*. All theſe by lawe are *neceſſarie* to be taken. for [1] if they be refuſed, being ſo tendered, hee is ouerthrowen (in his cauſe) that refuſeth; and is holden *pro confeſſo & conuicto*. And yet very often it falleth out, that by ſuch oathe, the partie is drawen to diſcouer his owne *dolum malum, couine, fraude, or mal-engine*, and other alſo his owne lewdneſſe; both preiudiciall (by lawe) to his honeſtie and good name, and alſo otherwiſe penall to himſelfe. For examples ſake by the nature of *Iuramentum calumniæ*, hee is to diſcouer (in ſome ſorte) euen the cogitations

[1] l.1. & Authen. principales, C. de iuram. calumniæ. Marr. de iuram. cal. nu. 6. Cuiacius. li. 9. obſ. ca. 37.

of his heart in that behalfe; viz. [1] *That he ſtandeth in lawe or affirmeth ſomething in a full opinion and confidence*; that hee hath of his owne right, and *that the ſuite, as hee maintemeth it, ſeemeth to him good and iuſt*. And [2] further, that *whatſoeuer he ſhall be asked about that matter; he ſhall anſwere it from time to time truly: & that he neither hath fraudulently giuen, nor will after giue, or promiſe to giue any thing, to corrupt the minde of any man, that hath to iudge in that cauſe.*

[1] l. 2. C. de iuram. calumniæ.

[2] Ibid. & d. Authen. principales. § i. Inſtit. de pœna temerè litig. Nou. 49. c. 3.

Nowe if in a priuate cauſe, betwixt priuate perſons, ſuing but for priuate benefite and commoditie, and at one of their petitions *per mercenarium Iudicis officium*, his aduerſarie muſt of neceſſitie take ſuch an oathe touching matters (perhaps) of his owne fraude and lewdneſſe; and to the diſcouering (oftentimes) of matters *criminall* and *penall* to himſelfe, or elſe muſt looſe his ſuite, and bee condemned as conuicted, by his owne preſumed and implied confeſſion, and this both by the *Canon* and *Ciuill* lawes (being the *Common* lawe in both courtes, of all other nations abroad in Chriſtendome:) then in a *publike cauſe* mooued by the Iudge *ex nobili officio*, where hee ſeeth by his diſcretion and direction of lawes, good cauſe in equitie, for the *publike intereſt* that the *Church* and *Common wealth* haue, that ſinnes be puniſhed and repreſſed; for diſcharge of his duetie according to the truſt repoſed in him, and not of malice or to pull any priuate benefite from the partie: how much more is it herein equall and *neceſſarie*, that an oath be miniſtred to ſuch preſumed delinquent, for the diſcouerie of the whole trueth? or elſe if hee ſtubburnely ſhall refuſe, that he bee holden (as in the other caſe afore) *pro confeſſo & conuicto?*

When an enemie of malice or for other ſiniſter reſpect doeth *accuſe* a man of a crime, *iudiciallie*; and brings him thereupon into queſtion and great danger; if he cannot make ſufficient proofes for his condemnation, yet by probable preſumptions hath ſo touched him, as thereby hee becommeth vnto the *Iudge* iuſtly to bee holden ſuſpected thereof: In this caſe, (by both the lawes aforeſaid) the Iudge is to giue an oath of *Purgation* to the ſuſpected perſon, touching that crime; which if he ſhall refuſe, he is holden as conuicted of it: whereby it may happen, that his accuſer is more gratified and pleaſured, then by any

proofes that him ſelfe could bring, or could otherwiſe procure. Is there not then much more equitie, when the queſtion and *enquirie* of the crime is ſtirred vp for a better purpoſe; and without any ſuch malitious accuſer; that vpon like preſumptions and probabilities, the like oath ſhould be giuen and tendered by the *Iudge*, to ſuch ſuppoſed delinquent?

Can any man giue a ſound reaſon, why it ſhould ſeeme equall, that when an enemie gaue the firſt occaſion, *pars rea* ſhould then (vpon preſumptions) be vrged to take the oath, or els to be condemned of the crime; And that it ſhould not bee much more equitie for him to take it; when the *Iudge* (for his dueties ſake, and ſtirred vp by probable inducements) doeth originally call him into queſtion?

And when a man is preſſed with ſuch probabilities as the Iudge findeth to be ſufficient thereunto, hee is iuſtly put to his oath of clearing himſelfe, if hee ſo can; and ſo this tendeth (in ſome ſort) to his owne benefit. Is it not much more reaſon then, that vpon the like preſumptions appearing to the *Iudge*, hee be vrged to that oath, to tell the whole truth of the matter, with the pertinent circumſtances, aſwell for the publike benefites ſake of the *common weale*, as for his owne good, and eſcaping of puniſhment?

Some may perhaps here aske, why the proceeding by the Iudge of *Office* ſhould bee more priuiledged in this behalfe, then when a crime is proceeded againſt, by an *accuſer or party*? For in the very beginning of the ſute, the Iudge proceeding *ex officio* may require the oath of the ſuppoſed delinquent touching both circumſtances and crime: but when hee proceedeth by way of *accuſation*, albeit in courts *Eccleſiaſticall*, the partie conuented may be examined by oath vpon other matter of circumſtance, yet hee may not ſo be examined touching the very fact and crime, or any thing neerely or *preſumptiuely* tending thereunto; vntill by ſufficient *preſumptions*, the *Iudge* be induced, to account him greatly to be holden ſuſpected.

This queſtion (almoſt) doeth anſwere it ſelfe: for when the *Iudge* proceedeth by *enquirie*; before hee offer the oath to the partie, the preſumptions againſt the partie are knowen vnto the *Iudge*: but when by way of *accuſation*, till the *accuſer* haue

brought in ſuch proofes as hee can, they are not knowen vnto him. Beſides, the *Accuſer* doeth it of malice, or for reuenge, or for other ſatiſfaction of his owne priuate humour, for the moſt part: But the Iudge (by common entendement) doeth it of ſinceritie of minde, and for the good of the *common weale*.

[1] Panorm. in c. per Inquiſitionem: de electione. & c. inquiſitionis, extra. de accuſat.

Againe, [1] thoſe that be conuicted vpon ſuch *Enquirie*, are (moſt vſually) puniſhed by ſome milder puniſhment, then when they are conuicted vpon an *accuſation:* yea and in eccleſiaſtical courts ſometimes, not ſo much as puniſhed at all *corporally*; but meanes onely of inducement to repentance, are vſed towards them.

All which being ioyned to that which hath bene afore ſpoken of the equitie of *Enquirie ex officio*, doe ſufficiently (I truſt) recommend both the generall equitie of the vſe of this *oath*, and alſo the great neceſſitie of it in ſundry cauſes, and vpon diuers occaſions.

But the *Treatiſour*, towards the very beginning of his diſputation againſt theſe oaths, ſurmiſeth; that in iuſtification of the equitie and conueniencie of them, it will by vs *be alledged*, that *the ſame is requiſite for the Enquirie, and finding out of ſuſpected faultes, whereof there is no proofe: and to ſearch and trie the euill mindes and corrupt conſciences of dangerous diſſemblers, and ſo neceſſarie for the gouernement of the Church and common wealth.* He that may penne his owne Commiſſion, will commonly make it large enough: and he that may be allowed to frame and temper his aduerſaries armour, is likely to make it thinne and ſlender inough. Were it then any maruell, though this man ſhould throughly anſwer ſuch obiections, as be wholy of his owne framing? You are to vnderſtand, that by this worde *the ſame*, in this place vſed; he vnderſtandeth *generall oathes for a man to diſcouer all his thoughtes, wordes and deedes:* whereof he had ſpoken in the ſentence afore: and this is the falſe iſſue which (*in the Epiſtle to the Reader*) I haue noted to bee by him tendered: againſt which, if any reaſon *materiall* had bene brought by him: yet it were but σκιομαχία, that is, fighting with his owne ſhadowe, and nothing touching any lawe or practiſe in this Realme.

In way of retortion againſt vs vpon this obiection, he inferreth, *that all ſuch are iuſtly reprooued, who haue practiſed and put in*

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vre this generall oath, where otherwiſe there was ſufficient proofe. But he may not thus cary away this later point which he interlaceth, viz. that there is no lawfull vſe of any defendants oath touching a matter criminall, *where other ſufficient proofes may be had.* For theſe abſurdities hereupon would followe: Firſt where no witneſſes are knowen to the *Iudges* aforehand (though they come in after the parties oath taken) that there a man by his owne periurie ſhould bee for euer cleared and acquited, and ſo (without any puniſhment or other worldly danger) hee might heape one grieuous ſinne vpon another. Secondly that a mans owne ſingle oathe in his owne cauſe, yea and for his owne clearing ſhould bee as effectuall and powerfull, as any two *mens oathes (by Gods worde) are allowed to be, touching another mans fact, whether it tende to acquitall, or to condemnation. Thirdly it would thereof follow, that all oathes in cauſes *criminall* ſhould be of *purgation*) and *clearing onely*, and none at all of *Enquirie*.

* Vide de hoc plura, ca. vlt. 3. partis.

But the *Treatiſour* himſelfe reaſoneth alſo in this his booke againſt *all oathes for purgation*: So that vpon the whole matter, hee maketh all kindes of oathes by defendants touching their owne offenſes or miſdemeanors to be ſimply vniuſt and vnlawfull: The contrary whereof in both will (I truſt) be prooued. Laſtly it would hereupon follow, that not onely *Eccleſiaſticall Courts*, but (for auoyding like iniuſtice,) the Starre-chamber alſo ſhould be barred, from giuing an oath in any criminall cauſe to the defendant, where the matter may (perhaps) bee prooued by witneſſes.

But (I pray) howe can either the Court, or the proſecutour tell preciſely, what the witneſſes will or can prooue, when they come to depoſe, by vertue of their oathes? For many a man when he is ſworne telleth another tale, then he did afore, when his tongue walked at libertie.

Therefore (by this opinion) the Iudges for giuing the defendant ſuch an oath, ſhall ſo long remaine vnder a doubtfull danger to haue dealt vniuſtly; vntill (by the euent of the ſute) it might be diſcouered; that the matter (indeede) coulde not bee proued by witneſſes.

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The *Treatiſor*, in reſuting *ex abſurdo* his own abſurd obiectiō; bringeth in (by the way) that theſe general oathes *would enforce men to accuſe themſelues to their publike ſhame, reproch, or condemnation: and their naturall parents, deereſt friends, and neereſt neighbours*: or elſe for auoyding of ſuch *miſchiefe and inconuenience, to commit moſt wilfull and damnable periurie*: and the *Notegatherer* ſayth it is vnnaturall: which becauſe it will be (perhappes) applied alſo to all oathes giuen euen in a particular criminall cauſe, and for that he thinketh this a matter very abſurde; therefore it requireth ſome briefe anſwere.

When a man vpon ſome ſuch ſufficient inducement, as is ſpoken of in the ſecond part, is brought before a *Magiſtrate* (*by ſpeciall Enquirie*) vnto *examination*: his diſcouery againſt himſelfe or other, neither by *Gods* Lawe, nor yet by mans Lawe is taken for an *accuſation vnnaturall*; but a neceſſary confeſſion of trueth, whereby God is glorified, ſin puniſhed, & the common wealth benefited, howſoeuer the partie ſuſteine thereby ſome touch in his reputation. *Be not* [1] *aſhamed* (ſaith *Eccleſiaſticus*) *to tell trueth for the good of thy ſoule: for there is a ſhame that bringeth ſinne: and there is a ſhame that turneth a man to honour and grace*: and therefore, he [2] ſaieth afterward: *Doe not gaineſay the trueth in anie the leaſt point: but be aſhamed of an vntrueth, though it proceede from thine owne ignorance. Be not aſhamed to confeſſe thy ſinne: and ſtop not the courſe of the floude.* And therefore (in ſuch reſpect) hee ought not to refuſe to take and performe his *oathe*; as more fully (God willing) remaineth to be ſhewed hereafter.

[1] Eccleſ. ca. 4. verſ. 24, 25.

[2] Ibidem verſ. 30. 31.

Another obiectiō he alſo maketh falling not vnaptly into this place, *viz. that where loſſe of life, libertie, member of the bodie, or good name may enſue, there the preſumption of periurie is great: and where it is ſo great, the ſentence of the Magiſtrate truſting to ſuch an oathe, is grounded but vpon a weake and feeble foundation.* So that in this his preſumptiō of periurie, he matcheth (without any good reaſon) the danger *of loſſe of good name*, with danger *of life, libertie, and limme*. with better reaſon he might haue put in *loſſe of worldly goodes*: and then by neceſſary conſequence hee had taken away the vſe of al oaths in euery ſubiect matter whatſoeuer. For who knoweth not, that for attaining riches and ſubſtance; moſt worldly men, not onely doe willingly hazard their good names,

names, honeſties and reputation: but that many doe alſo apparantly aduenture (for them) their liberties, limmes, liues, and ſoules? Therefore, if for feare of *periurie*, none oaths may be tendered, whereby a mans *good name*, may be queſtioned or impeached, much more then ought they not to be; where a mans welth and ſubſtance (which moſt men doe moſt thirſt after) may be any way thereby impaired, it is vpbraided as an affectiō too common with all men: *O cines, ciues, quærenda pecunia primùm, Virtus poſt nummos.* Vertue, honeſtie, and good reputation, are eſteemed by many degrees, woorthie to come behind riches. and therefore I anſwere, that where a crime is (in ſome ſorte) detected vnto the *Magiſtrate* alreadie: the preſumption is more ſtrong, that moſt men being ſworne, will rather deliuer a trueth, yea though it touch themſelues, or their friends (ſomewhat) in reputation; then that by periuring themſelues, they wil throwe both their owne bodies and ſoules into hell: *Nemo præſumitur immemor ſalutis æternæ*, ſaieth the lawe. In deed where the *Iudge* hath good and probable inducements againſt ſome ſpeciall perſon, that he is like (in any cauſe whatſoeuer) to forſweare himſelfe: there (as was ſaid afore) he ought to forbeare, to tender an oath. But it may not therefore bee made generall, as if no man at all ſhould be vrged to take an oath, for feare of being periured. Yet the *Treatiſour* here doeth ſeeme to encline this way: *in making an oath to bee ouer feeble a foundation, to ground a ſentence vpon.* Why? if the partie confeſſe againſt himſelfe that which is obiected; ſhall he be thought but to dallie, and to haue a longing to be puniſhed, ſo as the *Iudge* may not ſafely take him at his word, and giue ſentence againſt him? If a priſoner arrained pleade guiltie: what needes either *euidence*, or *Iurie* to be vſed; *Confeſſio eſt liquidiſſima probatio, & pluſquam probatio.* But if he denie it; yet if the proceeding in a court *Eccleſiaſticall*, be to his *purgation alone*; he is not to be acquited without a competent number of *Compurgators*: neither yet is he for euer ſo to be cleared, by the *Iudges* ſentence; but that euen after ſuch *purgation*; good prooſes touching the very fact it ſelfe (if any can be made) are to be admitted. which caſe happening, he is puniſhable both for the fact it ſelfe, and for his *periurie*.

But when the proceeding is by way of *enquirie*, for *puniſhment*

or for *reformation:* then albeit the defendant deny it, neuertheleſſe witneſſes or other proofes (if any may be had, either then or afterward) are to be vſed againſt him. And therefore in ſuch caſe as lawe alloweth ſentence to bee giuen vpon the defendants oath; yea or vpon *iudiciall confeſſion* without oath; it is *no feeble*, but rather a moſt ſtrong foundation for the *Iudge* to build vpon.

The *Note-gatherer* no leſſe miſſing the cuſhion and matter in iſſue, then the *Treatiſour*; reaſoneth thus againſt oaths (which they call *generall, vnto all thoughts, wordes and deeds:*) *Her highneſſe* (ſaieth he) *hath oftentimes cauſed to bee openly notified in the Starre-chamber, that her gracious meaning is not, to ſearch into mens conſciences; or to force the ſame; but onely to extend the lawes vpon crimes committed either in word or deed.* Belike if a man keepe not his conſcience (as he calleth it) to himſelfe, but vſeth ſome *ouert word or deede*, hee will then (I hope) permit the partie defendant to bee interrogated by *oath*, (as in the *Starre-chamber*) touching ſuch *a crime*. which if he will grant, let him, as much as he thinketh to bee for his eaſe; exclaime ſtill, againſt all ſuch *Ordinaries* and *Commiſſioners Eccleſiaſticall*, as ſhall happen to giue ſuch oath more *generally*, or without any ground precedent of inducement thereunto, by lawe allowed. for theſe vntrue imputations, will not touch any perſon or practiſe, that I haue heard of to bee vſed, ſince her *Maieſties* happy raigne. Thus much for the equitie of the defendants oath in ſome matters criminall; and in anſwere of obiections, made agaynſt the conueniencie of it.

CHAP. VI.

That oaths of men touching matters dammageable, criminall and penall to themſelues, are vrged & exacted by temporal Courts, and by the lawes of this Realme.

HEre I am to ſhewe, that the like oath in matters *criminall*, and that may *be penall* to a mans ſelfe; is practiſed by the courſe of the Lawes of this Realme; and therefore this proceeding, is no *contrary or repugnant courſe* vnto them.

The *Chancerie*, is a principal and high Court of

of this Realme; and a court of conſcience and equitie, to moderate, τὸ ἀκριβοδίκαιον, viz. the exact rigour of lawe.

In this court, though the proceedings (for the moſt part) be moued *Ciuiliter & nõ criminaliter*; that is, not to any *publike* puniſhment, but for the *priuate* intereſt of the partie: Neuertheleſſe, many bils of complaintes bee there put vp againſt defendants, wherein ſundry their lewd practiſes and miſdemeanors *criminall* bee deduced and ſet foorth; and yet muſt the defendant make perfite and particular anſwer thereto, vpon his oath.

The ſame courſe is obſerued in other courtes of the nature of *Chancerie*, as in the *Court of Requeſts*. And ſomtimes further alſo, euen *quando agitur criminaliter ad pœnam partis*: as is oftentimes obſerued in the Court of the *Counſell in the Marches and principalitie of Wales*, and before her *Maieſties Counſell*, eſtabliſhed in the *North parts*. So that, to the intent of a defendants being vrged by oath (ſometimes) to diſcouer himſelfe in a matter *criminall*; it commeth to as much in theſe courtes, as is chalenged for vnlawful, in Courtes eccleſiaſticall. For though in ſome of thoſe aforeſayd *Courts temporall*, no puniſhment can be inflicted thereupon; yet either diſcouerie of themſelues (if they be faultie) with *ſhame* and reproch to them; or elſe *periurie* is enforced in them all: which is the maine inconuenience, that the *Treatiſour*, and *Note-gatherer* doe aſſigne, againſt ſuch oaths.

There be ſundry conſiderations touching the court of *Chancerie*, which if we do attentiuely conſider, will argue vnto vs, the long vſe and approbation of vrging defendants anſweres to bee made vpon their *corporall oaths*: yea though ſome matter of their owne crimes and diſhoneſtie, be therein deduced.

It muſt needes be, that the *Chancerie* is the ancienteſt court of this Realme: becauſe frõ thence all *originall writs* & *Commiſſions* do come; wherupon the other courts do ground all their proceedings. And yet by all probabilitie it is moſt likely, that as in ſundry other points of proceeding there, ſo in this behalf, they drew the exacting of the defendants anſwere vpon oath, from the *Ciuill* lawe. For that Court being here in time and nature the firſt, could not take light from other *Courtes* of the *Common lawe*, but from ſome other, that was both afore it and them. Secondly, *Anſweres, Reioinders, &c.* in the other Courtes (moſt vſually

termed courtes of the *Common lawe*) are not put in vpon oath. Thirdly, the very worde of *Cancellarius* and *Cancellaria* are *Latin* wordes, that are found to haue bene firſt vſed by the *Ciuill* lawe, and did ſignifie ſuch an aſſiſtant to the *Soueraigne prince*, or other ſupreme *Iudge*, as for his wiſedome and skill in lawe, was adioyned vnto him: and was ſo called, becauſe he did ſit *intra eoſdem Cancellos cum Principe*, in the ſame Tribunall ſeate or bench with him, and in his abſence determined matters for him and in his ſtead. and yet we read not this word of *Cancellarius* in the ancient times of the *Ciuil* law, that was practiſed whiles their *Common wealth* ſtood vninuaded, by perpetuall *Dictators* & *Emperors*: nor till aboue 300. or 400. yeeres after: about which times, and afore; this realme being wholy vnder the *Romanes* dominion (as the chiefeſt part of the then knowen world alſo was) no doubt their language, but eſpecially their lawes, were here receiued. The ſundry *Colonies* and other townes built and inhabited here by the *Romane* ſouldiours, and others; muſt needs ſpread that language very farre.

The old *Britiſh* or *Welſh* language (at this day) after ſo many periods of times, viciſſitude of Fortune, and mixture of other nations; doeth retaine very many *prouinciall Latine* wordes. *Martiall* the *Poet*, that writ in the times of *Veſpaſian* and of *Domitian Emperours*, ſaieth thus of a *Britiſh* woman.

Claudia cæruleis cum ſit Ruffina Britannis:
Cur quaſo Latia pectora gentis habet?

This woman is thought by many, to be the ſame, whom S. *Paul* ſalutes in the end of the Epiſtle to the *Romanes*. And againe the ſame Poet.

Dicitur & noſtros cantare Britannia verſus: which argueth the vſe and knowledge of the *Latine* tongue, to haue bene (then) rife in this *Iland*.

That the *Ciuill* lawe of the *Romanes* was then vſed here, their hiſtories may teſtifie. for they gaue their owne lawes to moſt of the *Prouinces* which they ſubdued, and permitted *externas*, to very few of them. Many of the ſame lawes were alſo taken vp and reteined by the *Saxons*: euen vntill the *Norman conqueror* brought hither, & eſtabliſhed the cuſtomes of *Normandie*. And namely amongſt others, they retained til then the law; ỹ al brethrē ſhould participate

participate alike, their Fathers inheritance. And we do [1] reade, that *Trebatius* an ancient *Ciuill* Lawyer, and often alleadged in the *Pandects* (who liued in *Iulius Caſars* time, more then fourtie yeeres before *Chriſt*) did remaine at *Samarobrina* in this *Iland* of *Brytaine*. Likewiſe afterward, the [2] very oracle of that Law *Æmilius Paulus Papinianus* did profeſſe the lawe, and kept his Tribunall ſeate of *Pretorſhip*, at the citie of *Yorke*.

[1] Cic. famil. epiſt.

[2] Forcatulus.

Fourthly, that the *Chancerie* tooke this courſe & many points beſides from the *Ciuill* law; is apparant, by the whole courſe of other proceedings there, viz. by the defendāts anſwer to the bil vpon his oath, and ſometimes to *interrogatories*: by the ſundrie iſſues that there may be tendred: by that terme, and whole maner of *publication of witneſſes* depoſitions: by examining witneſſes vpon Interrogatories: by examining witneſſes *in perpetuam rei memoriam*: by the terme and vſe of *finall decree*, and manie other ſuch like points, much varying from the manner of common Lawe, and iumping, almoſt wholy, with the *Ciuill*. And to conclude, this conſideration is thereby made more probable: for that in elder times, the *Chancellors* to the Kings (for the moſt part) were *Clergie* men, whoſe ſtudie and profeſſion then, was the *Ciuill* lawes. Therefore this vrging to put in anſwere vpon corporall oathes taken (albeit the matter in ſome degree, happen to bee *criminall*) being a ſpeciall practiſe in that chieſeſt *Court* of *Equitie*; can hardly be conſtrued to bee againſt equitie. and being in the originall *temporall Court* of the land, cannot bee contrary to the *fundamentall* lawes of the ſame. and that Court being of ſo great antiquitie and continuance; this anſwere by oath, can not be an abuſe or corruption lately crept in; wherewith the *Treatiſour* (without any ground) chargeth all thoſe *temporall* Courts that haue receiued it.

In the Court of *Starre-chamber*, the proceedings are againſt crimes *criminally* mooued by way of *Enquirie*; though (for the moſt parte) at the promotion or ſolicitation of ſome priuate partie grieued. namely againſt *forgeries*, *periuries*, *ſubornations*, *ryots*, *rowts*, and other ſundrie heinous miſdemeanours: againſt which there lieth no *capital* puniſhment, nor loſſe of limme, by the *common* law. Yet is the defendant there, to anſwer vpon his *corporall oathe*, not onely to the bill preferred againſt him; but to as many

other (perhappes ſometimes euen croſſe) *Interrogatories*, as the Counſell of the plaintife ſhall deuiſe.

But to this (I heare) it is replied by ſome, that there bee two maine differences betwixt the courſe there, and the proceedings in a Court *Eccleſiaſticall*. The firſt, *that none there is bound to take his oathe, but onely where there is an accuſation preferred againſt him by an other: ſo as if he purge himſelfe lawfully, hee is to recouer dammages.* Touching *recouery of dammages* (if by *dammages* be meant coſts and charges) theſe for the moſt part be (in this caſe) alſo giuen euen by the high *Commiſſion*, that is ſo much impugned. For (except it be immediately for the *Queene*) there is a partie bound to proſecute and pay charges, if the defendant bee moleſted without cauſe. But if ſuch dammages (as they terme them) bee recouerable in the *Starrechamber*; I thinke they are not very great: and where the matter is preferred once by her *Maieſties learned Counſel*; I am tolde there be no coſts adiudged, though the defendant happen to be cleared. But if (in this behalfe) there were any difference; yet it makes no difference in the very point in handling: *videlicet*, that an oathe is there giuen to the partie in a cauſe *criminall* and *penall* to himſelfe.

The other part of the replie (builded vpon *an accuſation there preferred*) is indeede different from the courſe of *Eccleſiaſticall* proceeding: but yet if there be equitie for it in the *Starre-chamber*, it doeth much more fortifie the giuing of ſuch an Oathe in Courts *Eccleſiaſticall*. For in theſe Courts, if there be an *accuſer* or any partie that informeth or promoteth; then the defendant is neuer *examined by oathe* vpon the very crime. For when a partie proſecuteth, who (as the law intendeth) doth it for malice, reuenge, or ſome other particular reſpect; hee is not ſo much fauoured nor priuiledged in the proceeding; as when the Iudge *ex officio Nobili*, euen for his duties ſake, and for the publike commoditie of the common weale, doeth make the *Inquirie*.

If then it bee both equall and lawfull in the *Starre-chamber*, at the proſecution euen of a *priuate* perſon (who may be intended for the moſt part, not to doe it of conſcience onely & zeale of Iuſtice, to haue vice puniſhed) to *examine* the defendant vp-

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on his *oathe*, for diſcouerie, ofte times, of faults and miſdemeanours euen openly doone and committed, and ſo the more eaſie to be prooued by witneſſes, and where the puniſhments are vſually *corporall* and otherwiſe farre more grieuous, then bee inflicted in any Court *Eccleſiaſticall*: then howe can it in an *Eccleſiaſticall* court be thought vnreaſonable; whereas the *office*, dutie, and charge laide vpon the Iudge, are (by common entendment) the onely exciters and cauſes of proſecution: and where (if it be an *Ordinarie* Court) *canonicall* penance (for the *reformation* of the partie) is inflicted: And (if it be before the *Commiſſioners Eccleſiaſticall*) neither their greateſt *corporall* paine is ſo grieuous, nor their fines ſo deepe? And yet many of the crimes are as heinous towards God, & as ſecretly and cloſely committed and plotted; as any crimes are, that bee puniſhable before their *Lordſhips*, in that moſt honourable and ſincere court of the *Starre-chamber*.

The ſecond difference by ſome taken (in this behalf) betwene theſe proceedings; I heare, is this: that *in the Starre-chamber a man is not driuen to anſwere directly to the fact it ſelfe, but onely to the circumſtances of the facte, as was in Truſſers caſe, as is ſaide.*

But I am certainely informed (by thoſe that haue better cauſe to knowe the practiſe of that Court, then the Authour of theſe obiections and differences) that the practiſe of that Court is cleane otherwiſe.

As for *Truſſers* caſe, it was the *felonie* onely (a matter *capitall* to him) that was ordered not to be enquired of him by Oathe. but touching the lewd *confederacie* it ſelfe, and of his other practiſes about it, he was ordered (by oath) to anſwere them. So that the reaſon of the like equitie in both courts (theſe notwithſtanding) remaineth ſtill vnſhaken.

To this reaſon (as is noted elſewhere) the *Treatiſour* alſo (for his parte) doeth thus anſwere, viz. that *the Starre-chamber requireth anſwere to matter in facte, doone eyther to the iniurie of a priuate perſon, or hurte to the publike State*: as if he would inſinuate, that Courtes *Eccleſiaſticall* vrged Oathes in farre more vnreaſonable caſes. Truely, if the iniurie reach onely to a *priuate* perſon, without any further offence or ſcandall:

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the impoſing of anie ſuch oathe by *Ciuill* or *Canon* lawe, will not be iuſtified: and other then for anſwering matters in fact, doone to the breach of lawes, or to the offenſe of Almightie God, and conſequently to the *hurt of the publike State*; none oathe is at any time there exacted.

Yea not onely in the Courts aboue named, but in al the other Courts of *Record* at *Weſtminſter*; I am credibly informed, that, (time out of minde) it hath beene obſerued, for the *Iudges by corporall oathe* to *examine* any perſon; whome they had cauſe (in diſcretion) to ſuſpect to haue dealt lewdly, about any writ, returne, entrie of rule, pleading, or ſuch like matter (not being *capitall*) touching their ſeuerall Courts, as namely *Sherifes*, & their vnder *Officers* & *Miniſters*, *Protonotaries*, *Philizars*, *Chirographers*, *keepers of Records or Rules*, *Clerkes*, and ſometimes *Councellours* and *Atturneis*, or the very *parties*, hauing ſuites.

But becauſe the *Commiſſion* (as the *Note-gatherer* collecteth) *bindeth them preciſely to crimes puniſhable by the Eccleſiaſticall law, and to proceede according to the Eccleſiaſticall lawes of the Realme, and not according to the temporall: therefore* (ſaith he) *it is a friuolous allegation, to ſay; ſuch a thing is vſed in the Starre-chamber, Chancerie, or the Benches: ergo* the *Eccleſiaſticall Commiſſion* may do the like.

Firſt, here hee calleth them *Eccleſiaſticall lawes of the Realme*. how then are they *foreine*, and *ſtrange lawes*, and ſinewes of the *Romiſh Cerberus*, as the *Treatiſour* raueth? Secondly, if Courtes *Eccleſiaſticall* may not deale *according to temporall Lawes*; why doeth the *Treatiſour* threaten them with *præmunire*, for that *the policie of this Realme knoweth no ſuch oaths*, as he argueth? What? may they neither deale *according to temporall Lawes*, nor yet in a different courſe from them? Thirdly, the antecedent is vntrue: for by that *Commiſſion*, the breach of foure *Statutes* be enquirable and puniſhable: and the puniſhment alſo may bee other then *Eccleſiaſticall*, as is prooued in the firſt parte. Laſtly, none that ſtand in defence of theſe oathes do drawe their reaſon onlie from the practiſe of *temporall* Courtes in that ſorte, as hee ſurmiſeth; but thus: Whatſoeuer the *Eccleſiaſticall* Laws do allow and require being not *contrary* nor *repugnant* to the *Queenes prerogatiue royall*, *nor to the Lawes, Statutes and Cuſtomes of this Realme*,

Realme, that may be lawfully practiſed by *Iudges Eccleſiaſticall*. But this *oath* is ſuch; by reaſon that ſundry *temporall* Courts (by lawe) holde the like courſe, and doe not prohibit it in courts *Eccleſiaſticall*: ſo that, not being ſo much as *diuers* courſes, they can not be *contrary* or *repugnant*: therefore theſe oathes are lawfully practiſed in Courts *Eccleſiaſticall*. or thus: That which is *iuſtice* and *equitie* in one court, cannot be vniuſt, vnequall, or cruell, in another court, that is thereunto no leſſe authorized, then the firſt: but ſuch be theſe oathes, as appeareth by the practiſe of the aforeſayd *temporall* courts: therefore they are lawfull and equall alſo in *Eccleſiaſticall* courtes. But for more particular and fuller proofe of theſe two *minor* propoſitions, I will ſpeake firſt of oathes preſcribed by *ſtatutes*: And in theſe, firſt of ſuch as be taken in matters, that may onely bring *dammage* to the takers of ſuch oath: and then of oathes taken in matters both *criminall* and *penall* to the partie that takes them.

By the [1] ſtatute of *Wincheſter*, men within certaine yeeres of age, are to be aſſeſſed, and alſo ſworne; to haue all ſuch aſſeſſed armour in their houſes. [1] 13 Ed.1.ſtat. Winton.

The [2] *kings* widowes that haue dower of lands holden *in chiefe* of y *king*; muſt be ſworne, not to marry without the *kings* licence. [2] 17.Ed.2.Prærog.Reg ca.4.

By a [3] ſtatute of king *Edward the third*, a taxe is ſet, what *labourers* ſhall take: and they are thereby appointed to be ſworne, to doe thoſe labours, and to take no more then is allotted them: And that they ſhall not in *ſommer* depart, to ſerue in other places, then where they ſerued in *winter*. This oath is to be taken twiſe in a yeere: and if any of them refuſe to take it, hee is to be ſent to the ſtockes or gaole, till he will reforme himſelfe. [3] 25 Ed.3. de ſeru.ca.2. & 7.

Likewiſe by [4] another ſtatute afterwarde, all labourers and ſeruants are appointed to be ſworne both to doe ſeruice, and to take for the ſame, according to the ſtatutes: And if they refuſe; they ſhall be ſet in the ſtockes (for three dayes) till they will agree to it; and if they doe not, from thence ſhalbe ſent to the common *gaole*. [4] 27.H.4.ca.17.

The [5] *ſherife* hath power (*by ſtatute*) to *examine* euery chooſer of a Knight for the *Parliament*, vpon the *Euangeliſts*; how much he may diſpend by yeere. [5] 8.H.6.ca.7.

Thoſe that ſhall [6] go about to ſhippe ouer any woolles, and [6] 27.Ed.3.ſtat. ſtapulæ.

other merchandiſes, the *Maior* of the Staple and *Cuſtomer* ſhall make them take *oath*; that they ſhall not keepe Staple of thoſe merchandiſes on the other ſide the Sea.

[1] 11.H.7.ca.33. [1] Likewiſe, he that ſhall ſhippe an horſe (to carry ouer Sea) muſt ſweare; that at the time of ſhipping him, and at that time he ſweareth; he is fully purpoſed not to ſell him, but to haue him for his vſe.

By the ſtatute or awarde made at *Kenelworth: all that had to doe (in that behalfe)* were appointed to [2] ſweare *vpon the holy Goſpels of God; that they ſhould not take reuengement, &c. by occaſion of the commotion.*

[2] 51.H.3.

[3] Stat.de ſtap. 27.Ed.3.ca.6. *For the [3] value of merchandiſe brought in by ſtrangers, if they haue not letters of credence thereof, from their lordes or companies; they are to take an oath.*

[4] 23.Eli.ca.6. *The maſter, [4] owner, or ſhipper, is to giue true information by his oath,* concerning the burden of his ſhippe; to the intent *the money out of euery tunne allotted to Douer hauen, may be receiued.*

All which oathes, though moſt neceſſarie and equall; yet you ſee, howe they may bring great dammage and loſſe vnto the partie.

Nowe touching oathes appointed by *ſtatutes* that may tend and reach to make the partie diſcouer euen matter *criminall* or *penall* to himſelfe: By the [5] ſtatute of *Inquiſition vpon Coroners, the Enquirors ſhall make all the Bailifes ſweare, that they ſhall well and faithfully doe that which they ſhall haue in charge by the King and his Counſell, and that they ſhall conceale nothing of it.*

[5] Statut.de Exon. de Inquiſitione ſuper Coronatores.anno 14. Ed.1.Raſtall.tit. Coroners.nu.3.

Their charge is not onely of miſdemeanors, of *Coroners*; but alſo of concealements of murders and felonies, and letting ſuch eſcape, &c. done (happely) in default of a whole townеſhip in generall; and perhaps in default of the very *Bailifes* particularly, who be ſworne: and therefore *criminall* or *penall* to them, yet by vertue of their oathes not to be concealed.

[6] 9.Ed.3 ſtat.de moneta.ca 9. [6] *Maiors and Bailifes in euery port (where merchants and ſhips be) ſhall take an oath of merchants and maſters of ſhippes going and returning; that they ſhall not doe any fraude againſt that ordinance* (touching money) *in any point.* By which oath, it ſeemeth they not onely are to promiſe not to doe it (for they are to take it at their *going*) but alſo that they haue not done it being abroad; becauſe

becauſe they muſt take that oath alſo at their *returning*. And this being concerning *fraude* not to haue bene committed, toucheth matter of diſcouering a mans owne turpitude & offence; beſides the penaltie due to the offender.

If *a bill* or *information* bee put vp in any court of *Recorde*, againſt a man, vpon the ſtatute of [1] *Liueries* and *Retainers* (being very *criminall* and *penall* to the offenders) *after the Informer hath taken oathe, that his complaint is rightfull* (where by the way wee may ſee ſome vſe in theſe courtes, of that *iuramentum calumniæ*, which is required by the *Ciuill* lawes, if it be demaunded by either of the parties) *the defendant ſhall bee brought in, and put to anſwere to ſuch bill or billes, by ſuch information. And the ſame Iudges and euery of them in euery of the ſayde Courts ſhall haue power in their ſeuerall Iuriſdictions, to examine all perſons defendants and euery of them, vppon ſuch information; and to iudge him or them conuict or attainted, aſwell by ſuch examination, as by triall, as the caſe requireth after the diſcretion of the Iudges.* [1] 8. Ed. 4. ca. 2.

Vpon [2] *complaint by any touching periurie, and certified by a Iuſtice of Peace vnto the lorde Chancelour*: it was enacted in the time of King Henry the ſeuenth, that *the partie complained of, might bee compelled to come afore the Chancelour and Treaſourer of England, the chiefe Iuſtice of either Bench, and Clerke of the Rolles for the time being*: *and they had full power and authoritie, by their diſcretion to examine him of all things in the bill of complaint; and by their diſcretion, to puniſh ſuch, as by examination ſhould bee found offendours, aſwell in periurie, as in other offences, viz. in maintenance, imbracerie, or corruption in any Officer, &c.* [2] 11. H. 7. ca. 25.

In the ſayde Kings dayes, a ſtatute was afterwarde made, againſt *Retainers*; *whereby* [3] *Iuſtices at their Seſſions of Peace, were authorized to examine all ſuch by their diſcretion, as they ſhould thinke to bee ſuſpected of any Retainour: and their Certificate into the Kings Bench, againſt any examined and found faultie, was againſt ſuch, as a conuiction; and againſt others, as an Inditement.* [3] 19. H. 7. ca. 14.

The ſame [4] ſtatute alſo giueth authoritie to diuers great perſons, *to examine defendants informed againſt for certaine* offen- [4] Ibidem.

ſes and breach of Statutes; as well by oath as otherwiſe, by their diſcretion, and to adiudge, &c.

[1] 3.H.7.ca.1. 21.H.8.ca.10. 5.Eliz.ca.9. Likewiſe authoritie is giuen by [1] two ſeueral ſtatutes, vnto certaine great *officers* of the kingdome, *Lordes* &c. *to call ſuch grieuous offenders* (as there be named) *vpon bill or information: and them, and others (by their diſcretions, by whom the trueth may be knowen) to examine.*

That this *examination* is by *a corporall oath* taken, the continuall cuſtome in that honorable court *of Starre-chamber* obſerued, doeth ſhewe; for the breach of the ſayd ſtatutes is there to be puniſhed. And if *examination* were not ſo to be taken for the *parties* owne *oath*; then coulde it not ſo bee vnderſtoode of the *witneſſes*: For the word *examine*, is indifferentlie vſed for them all. And [2] *Brooke* in his *Abridgement* doth teſtifie, that *examination* ſpoken of in lawe, is *vpon oathe.*

[2] Brooke tit examination.nu.32.

[3] 24.H.8.ca.6. *If a* [3] *Vintener ſhall refuſe to ſell his wine in groſſe* (without iuſt cauſe) *vnto ſuch as offereth him the ſet price thereof in ready money, he ſhall forfeite as much, as the price of the wine.* Such *vintener alſo may (at the diſcretion of any Officer there named) be put to affirme and depoſe vpon his bodily oath, what, and howe much quantitie, and ſortes of wines hee ſhall haue; and whether hee keepeth them to ſell by retaile or in groſſe. and if after ſuch affirmance of intent to retaile them, hee ſhall ſell any of them in groſſe; hee forfeites the double value.*

[4] 34.H.8.ca.4. By a ſtatute of [4] *Bankrupts; the lordes there named, may (vpon relation to them giuen) call any perſon, ſuſpected to conceale ſuch offenders goods, and may examine them by their oathes, and otherwayes (as in diſcretion they ſhall thinke meete) vpon the ſpecialtie, certaintie, true declaration and knowledge of ſuch offenders goods, or debts, owing to him. And if he ſhewe not the whole trueth to be after prooued by witneſſes, &c. then he forfeiteth double the goods concealed.* The like [5] authority is alſo giuen to certaine *Commiſſioners*, to be appointed (by vertue of a later ſtatute) to tender an oath. But in this later, the double penaltie runnes againſt him; *If either hee doe not vpon his oath diſcloſe the whole trueth, or ſhall denie to ſweare.*

[5] 13.Eliz.ca.7.

[6] 5.Eliz.ca.1. The [6] oath of *Supremacie* or *obedience* is a *neceſſarie oath* to be taken by ſuch, as the *L. Chancelour* ſhall thinke fit *ex officio*

to

to haue it tendered vnto. Yet if the party carying a contrary perswasion shall refuse it, it becomes very *criminall*, and *penall* vnto him.

Such [1] as be supposed to be *parties* and *priuy* to the *fraude*, *collusion*, and *couin* vsed in conueyances by fugitiues ouer the sea, which *fraude*, *&c.* are there affirmed to be *things detested and abhorred by all good lawes*; *may by Commissioners appointed, or by the Barons of the Exchequer*; *be examined vpon their corporall oathes; to open and declare plainely the very trueth, to such Interrogatories, as shall bee ministred vnto them touching the premisses, and the circumstances and dependances of the same: vpon paine (if they shall refuse) to loose such a fine and fines for the saide contempt; as shall be assessed by such, before whome such examination shoulde be made.* In which (as in the other Statutes mentioned) it is euident; by how many wayes it may happen, that such *oathes* shall tend to the vrging of them to discouer matters *criminall* and *penall* to themselues, that are appointed to take them. And the foure last alledged, concerne oathes giuen; where neither *bill*, nor yet *information* is preferred against the parties *examined:* and therefore to be tendered, more then *ex mero officio.* [1] 13. Eliz. ca. 3.

In matters that may induce *dammage* to him that sweareth; there be sundrie examples at the Common lawe; one, or two may suffice. *If* [2] *a woman couert baron (being to acknowledge a fine) it be doubted, whether she be 21. yeeres of age or no, she shall be examined vpon her oathe.* [2] Y. 25. Ed. 3. fol. 44.

In an [3] *action of detinue of goods supposed to be deliuered in Fleetstreete, the Plaintife was examined, where they were deliuered. An* [4] *obligation bare date in the Countie of Lincolne, and a Scriueners name was put to it that remained in London; hereupon the Plaintife was examined, where the obligation was made.* Besides the dammage hereof; the circumstances of this, might be such; as might haue vrged him to discouer (perhaps) a *forgerie.* [3] P. 3. Hen. 6. 38. [4] H. 3. H. 6. 30.

It is a commō practise in this land, straitly to *examine* persons holden suspected of some crime or offence, and to vrge their answers; or else the *Magistrate* will and must needes holde them, greatly & violently to be suspected, & litle lesse then conuicted. If an vnlikely person (but suspected at large) be found in a *priuie search*; or stayed, as he passeth, and be brought before a *Iustice of*

peare or higher *Officer:* is he not ſtraitly thereupon to be examined of his abilitie, courſe of life, trade, and place of abode &c. which may importe *Roguerie*, that is both *criminall* and very *penall* to him, if he be ſuch an one in deede, and ſhall chooſe rather to endure the penaltie of lawe, then to lye before *God* and his *Magiſtrate?* If to this it be anſwered, that ſuch *examination* is without *oath*; I replye, that this is but as it happeneth: but admit it ſo be, yet the matter is hereby nothing holpen. For as to this purpoſe, of being vrged to diſcouer him ſelfe (which theſe men call *accuſing*) in a matter *criminall* & *penall*, it comes all to one paſſe: becauſe he muſt either holde his peace altogether, or confeſſe the truth plainly: (both which may bring him to puniſhment) or elſe he muſt lie, whereby he grieuouſly offendeth *God*, though not in ſo high degree (indeede) as in *periurie*. neuertheleſſe this bond of not ſaying vntruely before a *Magiſtrate* muſt needes be counted, a kinde of *cauſatiue* vrging of a man (that hath any conſcience) to diſcouer matter of *crime* againſt himſelfe, if he be guiltie in deede, of that which is asked of him.

If a *Sheriſe*, *Stewarde* of Liberties, *Reeue*, *Bedell of Strayes* and wayues, *rentgatherer*, *Sheepe-Reeue*, *Bayliſe*, *Bayliſe of husbandry*, or other accountant to the *Prince*, or any great Lorde, be vrged by their *Auditour* to giue vp their account vpon their oathes, as is vſually done: doeth not this (in caſe they haue done negligently, or deceitfully) tend to bewray, or (if ye wil) *accuſe* them ſelues, in a matter *ignominious* to themſelues, and in it ſelfe *criminall?*

The *Treatiſour* himſelfe, though he bend moſt of his *ordinance* againſt this point; yet when he had more exactly a little waded into, and weyed the matter; ſeemeth but onely to finde fault with *ſifting generally (by oath) of all mens thoughts, words and deedes*, and *eſpecially* (ſayth he in another place) *in matters of life and death*: which his iſſues if he will not waiue and relinquiſh; there is none (I thinke) in this Realme, that will impugne that his aſſertion, either by colour of *lawe*, or by rigour of *practiſe*.

For euen at the *common* lawe, *oathes* in matters *criminall* and *penall* to the parties, bee oftentimes *neceſſarily* to bee taken, when they are enioyned. For *if* [1] *a man ſue an appeale of murder againſt another; who will bee tryed by battaile, the defender*

[1] Stanford. Pleas of the Crowne. li. 3. ca. 14.

der that is appealed; muſt (before the battaile) holding his aduerſarie by the hand, ſolemnely ſweare thus: Heare this, you whome I holde by the hand, who call your ſelfe by ſuch a name; I haue not felonioufly murdered your father, &c. ſo helpe mee God and all Saints.

Of *Oathes* miniſtred at the *Common* lawe, tending to the diſcouerie of matter *criminall* and *penall* to the partie himſelfe; I finde theſe examples. *One* [1] *ſworne of a Iurie, did after departe from his fellowes. In the meane time an other was ſworne in his roome. But when the firſt returned, hee was by the Iudges ex officio examined, vpon his booke oathe; whether hee had talked with the defendant or beene in his company, ſince he was ſworne.* This (if he had confeſſed it) as it is an offence, ſo had it beene very *penall* vnto him. *Neuertheleſſe for his apparant fault of departure, hee was committed and fined.* [1] M. 34. Ed. 3. fol. 3.

In an action [2] *of Formedon, the tenant of the land was ſuppoſed to confeſſe the action of the demandant by couin, and was thereupon examined by the Iudges; and the couin being thereby founde; it was decreed, there ſhould be no iudgement, and that he ſhould be puniſhed, by their diſcretion.* [2] T. 7. H. 4. fol. 19

A [3] *woman brought an appeale for the death of her husband, but (as it was ſuppoſed) by another name then ſhe had in very deede: vpon which couin, ſhe ſhould haue beene fined, and thereupon ſhe was examined.* [3] P. 9. H. 5. 1.

A [4] *Iurie after they were gone together, were ſuppoſed to haue receiued a letter on the behalfe of the defendant: which in law is ſaid to be a grieuous fault, and it is to be grieuouſly fined: yet all the Iurours were thereupon examined vpon their oathes.* [4] H. 35. H. 6. & Fitzh. Abridgem. tit. examinat. nu. 17.

A [5] *Sherife returned, that certaine witneſſes, who ſhould haue appeared, were dead: whereof it was deſired, he might be examined, becauſe the returne was razed, and two of the witneſſes were ſaide to be aline, whereof one was then in the Hall, and had his remaining in the Countrey. Whereupon the Sherife was examined, which Priſot enformed: and hee depoſed, that the returne was made by a Clearke, and neither by him, nor by his Vnder-ſherife: and that he knew two of the witneſſes were liuing.* Now if he could not (with a good conſcience) thus haue cleared himſelfe vpon his oathe; had not this *crime* of *razure* and *falſe returne*, beene verie *penall* and [5] M. 35. H. 6. 11.

and ſhamefull vnto him, being ſo directly contrary to honeſtie and to his oath, taken at the entrance into his *office?*

1 H.10.Ed.4.16. [1] *And it was* (at another time) *the opinion of the whole court; if the parties in a cauſe had then had a day in court; that they might haue examined them, touching their couin and lewd practiſe, tending to defeate another man, of his lawfull action.*

They haue a certaine cuſtome in *London*, and it is allowed for good by the *Common lawe* of the Realme: [2] *That if the defendant thinke the plaintife haue made a falſe declaration in an action of debt; he may deſire to haue the plaintife ſworne to the trueth of his declaration, and ſhall haue it. If the plaintife ſweare, the defendant is condemned: and if the plaintife refuſe, he is barred.* And may not this *delation* of ſuch *deciſorie oath*, occaſion, and (*cauſatiuely*) vrge the plaintife (ſometimes) to diſcouer himſelfe to haue demaunded a debt not due, which is *diſhoneſtie* and *vniuſtice:* or (perhaps) induce him to periurie, partly for filthie lucres ſake, & partly that he may not ſeeme to haue diſhoneſtly demaunded, what was not due vnto him? if then a priuate perſon, neuertheleſſe may ſo *deferre* an *oath*, but in a priuate money matter: how much more may a *magiſtrate* in a *publike crime*, theſe doubts and perils notwithſtanding?

2 Brooke tit. ley gager, nu.77.

And the like *deciſorie oathes* be not onely receiued in that *Citie* alone, but alſo at the *common lawe. For* [3] *when the defendant deſires, that the plaintife may be examined, or ſworne, this is peremptorie to the plaintife in this point. and ſo is the wager of lawe, ex parte defendentis.*

3 19.H.6.43.

4 44.Ed.3.41. *In an action of* [4] *detinue brought againſt a Deane, for a cheſt ſealed with certaine golde, ſiluer, and Charters in it, as being deliuered to his predeceſſour; the Deane tendered his law* (that is his oath) *quod non detinet: and the opinion of the court was; that he ſhould haue it.* Now who ſeeth not, howe many wayes, this courſe may no leſſe induce men vnto periurie? For doeth not common experience teach vs, howe readily, for a trifling piece of gaine, tradeſmen in buying and ſelling will ſweare falſely, or els cautelouſly, which is all one fault before God: yea when as no ſuch matter is required, or exſpected at their hands? therefore howe much more ſtrongly may *periurie* bee feared, in a matter of good weight; eſpecially when men by the vexation and ſute of their aduerſaries

aduerſaries are whetted on, and where as, they hauing (a good while) ſtoode in deniall; their *credits* amongs other men, might otherwiſe be called in queſtion, and ſeeme to be impayred? And yet this danger that *periurie* may perhaps enſue, is no ſufficient reaſon to change the *common lawe*, in this behalfe. Howe then can moſt of the *Treatiſours* arguments holde; which are chiefly grounded vpon perill of *periurie*; which (he ſaith) is likely a man will fall into, rather then haue his *good name* and *honeſtie* brought into queſtion, and hazarded?

I haue alſo credibly heard, that in the time of that Reuerend Iudge *Dyer*, the court of *Common pleas*, examined certaine by their *corporall oathes*, touching a very lewde plat layde by ſome of them: and the names of the dealers *pro & contra*, in that cauſe, were (as I remember) *Grenill*, *Pyne*, and *Hockam*, which being ſo found out, was condignely alſo puniſhed in ſome of the offendours, both by perpetuall *infamie*, and with other puniſhment.

CHAP. VII.

Wherein are conteyned anſweres to ſuch obiections and reaſons, as bee made for proofe of a contrarietie or repugnancie in theſe oathes, vnto the ſtatutes, lawes, or Cuſtomes of this Realme; and a Replie to the Treatiſors anſweres, made vnto certaine obiections, ſuppoſed likely to be made, in Iuſtification of this kinde of oath by the temporall lawes.

IN this Chapter I purpoſe (God willing) to anſwere thoſe poynts, which by the *Treatiſour* or *Note-gatherer* are brought, to perſwade; that ſuch *oath* (as here we handle) is either plainely *impugned*, or cloſely *contraryed* by the lawes *temporall* of this Realme.

Vnder this conſideration doe fall certaine *bare affirmations* about this matter; their *reaſons* for this aſſertion, and their *anſweres* to ſuch *obiections*, as are by them ſuppoſed may be made, in defenſe of this kinde of oath.

Among their *bare affirmations* about this matter, I recken ſome things, which they imagine to be ſayde or practiſed, by

Eccleſiaſticall Courtes or perſons: and that which they affirme, the *common lawe* either holdeth or practiſeth on the one ſide; or els on the other ſide forbeareth to put in vſe, in this behalfe.

To the poynt of *practiſe* by perſons and Courtes *Eccleſiaſticall*; are referred thoſe the *Treatiſours* imputations; whereby he ſurmiſeth *generall oathes*, for all a mans thoughts, wordes, and workes, to bee miniſtred by them: and that *vpon the Eccleſiaſticall Iudges onely iealouſie and ſuſpition, without any other lawfull inducement precedent*. Likewiſe that it is *tendered in matters tending to loſſe of life or of limme*. All which I haue elſe-where ſhewed, to bee very vntrue, and ſlanderous. Hither alſo is to be reduced another ſpeech of the *Treatiſours*: for whereas the defenders of this *oath* doe affirme it, as it is practiſed (but not in ſuch a *catholike* or *vniuerſall* maner, as he ſporteth himſelfe at) to be warranted by *the temporall lawes:* he ſaith; that *this is a foule ſclander both to our lawes, and to the Iuſtice of our land.*

The trueth or falſehoode of which his *fowle* ſaying, will appeare; vpon peruſall of the next precedent, of this, and of the next *Chapters* following. And ſo will alſo theſe other his ſpeeches to like purpoſe, viz. where hee calleth it, *an alien heretofore entruded, as a troubleſome gheſt into the houſe of our common wealth*. And where he ſaith, that as *Sir William Thorpe, by his corrupt dealing, ſo much as in him lay, had broken the oath which the king is bound to keepe towards his people: ſo the eccleſiaſticall Iudges practiſing in their Courts and tribunall ſeates, the ſelfe ſame vniuſt and vnlawfull maner of proceedings, againſt the kings people; coulde not eſcape the ſeuere ſentence of lawe, pronouncing them offenſiue butchers, and violatours of the king, and iniurious dealers againſt his Regalitie, crowne, and kingdome; and ſo conſequently, &c. in a Premunire.*

But for any teſtimonie of this *corrupt dealing* of *Sir William Thorpes* (which here hee ſpeaketh of) or of his *breaking of the kings oath*, and ſo *ſeuere ſentence of lawe* paſſed in that reſpect againſt his *butcherie* and *violation of the kings Regalitie* &c. though I haue ſought for it, yet can I not finde; neither doth the

Treatiſour

Treatiſour giue vs any direction for it. His meaning herein (though couered with ſlye wordes) is eaſie to bee diſcerned, through his vizard. For if the oath were made by the *king* onely, how could it bee broken by *Thorpe*, and the *king* bee vnblameable? for no man is ſimplie bound (by oath) to performe other mens integrities. and ſeeing hee chargeth *eccleſiaſticall Iudges, with the ſelfe ſame vniuſt and vnlawfull maner of proceeding:* though his concluſion (drawen from the likeneſſe betwixt theſe caſes) be onely this, *videlicet*, that they are thereby fallen into *Præmunire:* yet his very meaning, and what *concluſion* was by him meant to haue followed thereon, by the former part of the compariſon, is made apparant, *videlicet*, a couert, diſloyall, and moſt lewde charge; as if ſome now had no leſſe broken the *oath* which they haue taken, howbeit procured or induced thereunto, by *Iudges and Courtes eccleſiaſticall*. But if ſuch Eccleſiaſticall Iudges haue neither indeuoured any ſuch breach; neither yet their *practiſe* of the oathe by him here condemned, bee impugned by any *lawe*; then can it not bee auoided, but that the *Treatiſour* (in very deede) had ſuch an vnduetifull and ſlaunderous purpoſe and reach, in his words aforeſayd.

To the ſecond degree of their *bare affirmations*, ſuch ſpeaches of *Temporall* Courts *practiſe, or forbearing to practiſe* (as theſe following bee) doe belong, *videlicet*, that *ſuch a generall oathe or ſuch like ex officio, was neuer offered nor taken*; for you may perceiue, he is not reſolued throughly; whether of theſe two hee had beſt inſiſt vpon, or take for his iſſue: And that, *the common lawes haue euer reiected and impugned it*. Likewiſe, that *it was neuer put in vre by any Ciuill Magiſtrate of the land, but as it is corruptly crept in amongſt other abuſes, by the ſiniſter practiſes and pretenſes of the Romiſh Prelates and Clergie-men.* which aſſeueration, as it is (in that part) voyd of all likelyhood, where it is ſurmiſed that the *practiſes & pretenſes of Clergie-men*, did firſt ſhoulder this oath into *Ciuill* or *Temporall* Courts: ſo is it yet, an implied kind of confeſſion; that it is not ſuch *an Alien to the Ciuill pollicie of the Realme*, nor by it wholie reiected *& impugned*, as in his *treatiſe* he beareth vs ſtrangelie in hand. Beſides that, ſuch *implication* is flat *repugnant* & *contradictorie*, to ỹ *Note-gatherer*; who writeth,

that *it was neuer vſed here to make men accuſe themſelues:* for by this *accuſing* he meaneth giuing of oaths to defendants, touching diſcouerie of ſome their owne offences. Laſtly, that where *loſſe of life, libertie, or good name may enſue; the Common law hath forborne oathes.* As for loſſe of life, it is yeelded to be true, which he here ſaith: but not ſo, for the other two. for the *Starre-chamber* (being a *Temporall* or *Ciuill* Court) impoſeth oathes, where both *infamie* may and doeth follow for puniſhment; and where *libertie* is reſtrained moſt often by *impriſonment*, and ſometimes alſo by *baniſhment*.

Vnto the other head of their *bare affirmations*, which is, what the *Common lawe* holdeth, in this behalfe: ſuch of their ſpeaches as theſe following, doe appertaine, *videlicet*, *to giue oath* (they meane to the defendants) *in cauſes of life and death, is contrarie to the Iuſtice of the lande*. This, albeit, it no way impugne any practiſe *Eccleſiaſticall:* yet is it flat repugnant to the *Note-gatherers* aſſertion, ſpoken vnto in the [1] ſecond part. Agayne, that *the Common lawes haue not appoynted an oath to bee vſed, but according to the right inſtitution thereof:* and that *in cauſes capitall or criminall, theſe lawes neither vrge by oath, nor force by torment, a thing moſt cruell and barbarous*, and therefore agaynſt *torturing*, he alleageth maſter *Forteſcue* in his booke *De laudibus legum Anglia*. It is wholie beſides my purpoſe either to auow or diſauow here, the courſe of finding out trueth by *torture*; yet much might on both ſides (probablie) bee ſayd therein, both by reaſon, and alſo by graue authoritie.

[1] ca. 10. pag. 93.

That the defendants *oath* in cauſes *capitall*, neither is vſed nor allowed by the lawes of this *Realme*, I doe yeeld vnto him, as afore I haue ſayd; but for *torture*, let me neuertheleſſe put him in minde, that it may perhaps be thought of very hard, to haue it thus affirmed; that the *torturing* of ſuppoſed *Capitall* offenders, not only vſed in *Campes*, but alſo (within the *Marches* & principalitie of *Wales*) euen in time of peace, well warranted by her *Maieſties inſtructions*, and by Act of *Parliament*, & in the *Tower of London* for matters of *treaſon*: ſhould all of them be accounted abſolutely *contrary to lawe*; or (which is more) *to bee courſes moſt cruell and barbarous*.

The other poynt thereof, which is of not vrging a defendant by

by *oathe* in any cauſe *criminall*; is the maine point here trauerſed betwixt vs; and therefore may not be caried thus away by him, *per petitionem principij*, without ſome ſound reaſon.

All theſe aforeſayde ſpeaches I doe muſter amongſt their *bare affirmations*; and haue the longer ſtoode vpon them, becauſe themſelues doe not ſo much as aſſaie or vndertake to prooue moſt of thē, by any colourable argument or authoritie: & for that the reaſons, which they tacke on, vnto ſome of them, doe not hang together by any *conſequence*; and for that diuers of them might bee granted, without any detriment to the cauſe which wee defend. for they be but *voluntarie* ſpeaches, let ſlip at randome. this therefore commeth vnder his miſtaking of the true iſſue. yet they be ſuch, as ſeemed not vnmeete to bee mentioned; leaſt (if the *Author* of them doe happilie holde them for ſound reaſons) hee ſhould complaine to haue a piece of wrong offered vnto him, for that all his booke was not ſpoken vnto, and anſwered.

Next doe follow thoſe their reaſons to be diſcuſſed, which they take from the *lawes* of this Realme. and firſt concerning ſuch of them, as be made out of *Statutes*; and afterward we will come to their booke caſes. That which hee ſpeaketh of *Magna charta*, albeit he handle it laſt, yet for the *ancientie*, ſeemeth to deſerue the firſt ranke. he auoucheth no particular part thereof: but taking (as graunted) a contrarietie (belike in his opinion) not trauerſable, to be betwixt proceeding by this *oath*, and the ſayd *Statute*; he onely (in high wordes) telleth vs, of a *moſt iuſt curſe of Anathematizing, laied by the Biſhops then, againſt all wilfull infringers of that Charter*. If I ſhould geſſe what poynt thereof it is, which hee intendeth to bee ſo contrary to theſe oathes; I would take the *nineteenth chapter* thereof (if any) to bee meant: both becauſe *putting to an oathe* is there mentioned; and for that I haue heard it (to like purpoſe) alleaged by ſome other. Howbeit the *Treatiſour* hauing farre better inſight (as ſeemeth) in lawe, then hee that ſo alleaged it; thought good to skippe it ouer, without all allegation; for feare it would not ſo wel helpe his turne. The wordes are theſe, *videlicet*, *No*[1] *Bailiffe ſhall from hencefoorth put any man to his open lawe, nor to an oathe, vpon his*

[1] Magna charta, ca. 19.

owne bare saying; without faythfull witnesses, brought in for the same. I must confesse, that these wordes are some thing too obscure and darke for mee to vnderstand, what is *positiuely* and precisely meant by them. and so much the rather, because I know not the vsage afore that time; which (thereby) was ment to be remedied: except I should coniecture, that the *bare saying* (there) spoken of; is to bee referred to the man, that taketh the *oath*, and not to the *Bailife:* and then would it seeme to establish that practise, which is vsed in *waging of lawe* with two or more *witnesses* or handes, concurring with his *oath* that sweareth.

Howsoeuer it be (in verie deed) to be vnderstood; it is easie inough to gather, what can not be meant by it. First therefore, it cannot any way be extended to proceedings and courtes *Ecclesiasticall*, for whatsoeuer is in that *Statute* graunted, after *confirmation of the Churches liberties* (except it bee otherwise plainely expressed) is referred to *Courtes* and matters *Temporall:* betweene which and causes *ecclesiasticall* (as is noted afore) there was made both in those times, and also long after; a plaine seuerance and distinction, in the groundes of their seuerall authorities, and *iurisdictions.* so that the one was called the *Kings Court*, and the other a *Spirituall*, or *Court Christian.* and therefore as nothing was in that *Charter* anewe *graunted*, but *confirmed* onely, vnto the *Church of England:* so is it to be iudged on all handes, that the *king* would not make lawes there, to restraine the courses of proceeding *ecclesiasticall*; because it could not be without disanulling and reuoking of that which immediately afore (euen by the same *Acte*) hee had first of all confirmed vnto them.

Secondly, a *Bailife* onely, is there mentioned, which should *put or not put a man to his oath*; which cannot well and properlie be vnderstood of any, but of some *officer temporall.*

Thirdly, these wordes are no way appliable, to the practise of courtes *ecclesiasticall:* for albeit vnder the name of *Bailife* an *Ordinarie* might be vnderstood (which were very harsh, insomuch as a *Bailife* is but a *Reeue* of a *Baile* or Libertie) yet is it not holden by any lawe *ecclesiasticall*; that *vpon an Ordinaries owne bare saying,*

ſaying, whether he haue *witneſſes* after to bee produced or not; a man may bee put to an *oath*, for there muſt bee ſome better matter of inducement, to open way to the *enquirie*, whereupon the *oath* enſueth.

Laſtly, this ſtatute will rather hurt, then helpe forward theſe mens purpoſes, if an *Ordinarie* might here be vnderſtood by a *Bayliſe*. becauſe (if I conceiue the matter aright) by this is implyed; that ſo an *Ordinarie* be able to bring in good *witneſſes*; he may then *vpon his bare ſaying put a man to his open lawe, or to an oath*. But hereupon would followe, that *Criminall proſecution* without *any accuſer* or other partie, and ſo *ex officio mero*; yea and without any *preſentment* too, may bee *lawfully* admitted: and (which is moſt to our preſent purpoſe in handling) that an *oath* (in ſuch caſe) by him may bee impoſed, in any matter aſwell *Criminall* as other. For heere is no diſtinction made of any one kinde of cauſe from another, and they which alledge it, doe bring it to impugne proceeding by the defendants *oath*, againſt *crimes*.

The allegation of the *Treatiſour* out of the ſtatute of *Marlebridge* or *Marleborough* falleth next in time to bee conſidered: the whole wordes [1] whereof are theſe: *none fr.. hencefoorth may diſtreyne his freeholders, to anſwere for their free holdes, nor for any thing touching their freeholde, without the kings writ: nor ſhall cauſe his freeholders to ſweare againſt their willes, for no man may doe that, without the kings commaundement.* But the *Treatiſour* leaueth out the firſt part which ſheweth, howe the ſecond that he alledgeth, is to be vnderſtoode. And becauſe (like the *lapwing* with her diuerting cries) hee would leade vs further and further from the matter (herein) chiefly to be reſpected: or for that he thought wee would make ſome aduantage hereof; he ſaith, that the *kings commaundement* importeth here thus much, viz. *according to the law & Iuſtice of this Realme*; and for this quoteth a booke thus: 2.R.3.

[1] Marlebr.52. H.3.cap.22.

The booke he meaneth (as I geſſe) is in [2] theſe words: *whereſoeuer a man for offence, miſpriſion or otherwiſe, is to make fine or redemption all the Iuſtices agreed, that thoſe Iuſtices before whome he was committed, &c. ſhould take ſuretie and pledges for the fine, &c. and after by their diſcretion, they ſhould aſſeſſe the fine, and*

[2] Mich.2.R.3. fol.11.

not the king in his chamber; nor otherwiſe before him; but by his Iuſtices. and ſo is the kings will (in ſtatute) to be taken, viz. by his Iuſtices and his lawe, which to ſay, in effect is all one &c. Where you ſee, that the booke ſpeaking of *Iuſtices* (viz. the *men* before whome the conuiction was made) he referreth this to the *Iuſtice of the land.*

But though it be neither off nor on, to our Principall purpoſe; neuertheleſſe it ſeemeth, this booke is not truely applied by him vnto this ſtatute: and that by the *kings commaundement* in the ſtatute; the *kings writ* is to be vnderſtood, (as in the firſt part of that *ſtatute* is plainely expreſſed) rather then any determination or *Act* of his *Iuſtices of the Bench.*

Touching the ſtatute it ſelfe; the wordes doe euidently ſhew, that neither *oath* in cauſe *criminall*, nor any *Court Eccleſiaſticall* is thereby meant. there is onely forbidden, that *lords of manors* ſhall not inforce their *Freeholders* that holde lande of them, whether it be by *diſtreſſe* or *oathes*, to anſwere in their *Courtes baron*, touching the eſtates they haue in their landes. becauſe neither the *lordes* owne *courts* (in ſuch a caſe) be *competent* or indifferent, for feare of vnlawfull euiction; nor the goodneſſe or weakeneſſe of the ſtates men holde, are meete to be fiſhed out by their owne *oathes* in ſatisfaction of their lordes greedineſſe, to haue their lands: except the *king* by his *writ* ſhall ſo eſpecially *command.* And yet hereby wee ſee, the ſtatute leaueth it at large at the *kings* pleaſure, to warrant euen this courſe: and therefore this is not ſimply *vniuſt*, but inconuenient onely, for *lords* ſo to vrge their *tenants.*

He alledgeth further (againſt theſe *oathes*) a *ſtatute* (as hee ſaith) made 43. Ed. 3. ca. 9. *that no man be put to anſwere without preſentment before Iuſtice, or matter of Record, or by due proces, or by writ originall after the ancient lawes of this land.*

But I doe finde no ſuch *ſtatute* either in that yeere, or in any other like number of Chapter, of that *king:* and that *Parliament* which he voucheth, hath not ſo many Chapters. But admitting it, what is this to proue an vnlawfulneſſe of oathes miniſtred vnto defendants in matters *criminall*, whereof there is no ſhadowe of mention? it rather ſpeaketh of matters that ought to goe afore proceedings *criminall* at the *common lawe.*

and

and what makes this againſt *Courts Eccleſiaſticall?* woulde hee haue them to proceede in the ſelfe ſame maner, that *common lawe* courts doe? hee might aſwell exact of them, *Indictments*, and afterward *tryals by Iuries* of twelue. and yet *Eccleſiaſticall* courts put none to anſwere, but vpon moe then one of theſe, or at leaſt that which is equiualent at that lawe, vnto theſe at the *common* lawe. For firſt, courts *Eccleſiaſtical* haue great vſe of *preſentments* and *complaints* or *denunciations* before the partie be called to anſwere; as is ſhewed in the ſecond part. Then the defendant is not called neither, but by *due proceſſe*; as by *letters miſſiue*, or by *attachment* in Courtes of *Commiſſion*; & *by Primarie citation, in Ordinarie Courtes:* which haue a correſpondence vnto *originall writs* at the cõmon law. So that of foure matters, wherof ſome one or other of them is thereby required; three of them be vſed in *Eccleſiaſticall* proceedings againſt *crymes*.

His next proofe (of this kinde) cõming to be diſcuſſed, is out of the[1] *preamble* of a ſtatute of king Henry ỹ 8. which preamble (for breuitie ſake) he omitteth: yet hee omitteth not to gather therefrom, that which was neuer ſcattered, viz. *ſo we ſee* (ſaith he) *that vnder cloked and couert termes (of Canonicall ſanctions*, viz. *vſed in the ſtatute 2. H. 4.) the clergie men vſurped (vniuſtly) iuriſdiction ouer the people, miniſtring vnto them captious and ſnarling Interrogatories: and (as it ſhould ſeeme by hiſtories) vpon oath, contrary to the true meaning of the lawe and lawe-makers, and againſt the right order of Iuſtice and all good equitie: impugning thereby the royall prerogatiue, the imperiall Crowne, the Princely ſcepter, lawes, and policie of this kingdome*: for which cauſe he ſaith it was repealed. Theſe be *imputations* of great and high matters; which he auowcheth to be by ſuch *oath* impugned, which though he ſay *we ſee* by that *preamble* (though indeede hee would not let vs *ſee* it) yet when all is caſt vp, his proofes are no more but thus, viz. *as it ſhould ſeeme*; but how much hereof may (in trueth) thence be *ſeene* either plainely, or by any *ſeeming*; I would the cleareſt ſighted of that opinion, would take the paines to peruſe; that hee may withall diſcerne, with what vpright mindes and ſinceritie, ſome of his chiefe complices doe write of this matter.

[1] 25. H. 8. cap. 14.

For the very true and onely cauſes of repeale of the *ſtatute*

of hereſie, 2.H.4. by the *preamble* of the ſaide ſtatute 25.H.8. (nowe likewiſe ſtanding alſo it ſelfe repealed) are aſſigned to be theſe, viz. *the not declaring thereby what ſhould be hereſie. The terme of Canonicall ſanctions, and other termes thereof, ſo generall: that the beſt learned coulde ſcarſe auoyde the danger of hereſie, if he ſhould bee examined vpon captious Interrogatories: the vnreaſonableneſſe of being put to loſſe of life &c. vpon ſuſpition, and without accuſation or preſentment: whereas for treaſon it muſt bee vpon preſentment, verdict, confeſſion, or proces of outlawrie:* and, for that *ſpeaking or doing againſt the Canons &c, of Popes (being but humaine, yea, and many of them contrarie to the kings Prerogatiue Royall) is by th' ſayde Canons, made to bee hereſie.* ſo that there is not one word mentioning, much leſſe tending to the condemnation of miniſtring *oath*; no not ſo much as in the *crime of hereſie*, which is *capitall:* nor yet any of the other great thunderclaps which the *Treatiſour* pretendeth he ſawe or heard of in that *Preamble*, againſt *oathes in ſome criminall cauſes.*

To this purpoſe he woulde haue vs *further note*, that *the ſtatute of ſixe Articles doth not enact nor allowe, but that it ſeemeth rather to diſallowe, and reiect theſe oathes.* Why Sir, it ſpeaketh not of them at all: and can you therefore gather, that *it doth not allowe, but rather diſallowe them?* you might ſo reaſon againſt them, from all the ſtatutes that euer were made touching any different matter whatſoeuer. But (ſay you) *it ſeemeth rather to diſallowe them:* is not this *ſeeming* a ſound *demonſtratiue argument*, to ouerthrowe a courſe ſo long and ſo manifoldly vſed, and that in the courts of both ſortes? but why doth it ſo *ſeeme?* forſooth, becauſe *the king is by that ſtatute authoriſed to direct Commiſſions to Ordinaries and others, to take information and accuſation, by the oathes of two ſufficient perſons at the leaſt, or by verdict of twelue men.* What then? therefore the *examination* of the *partie* vpon his owne *oath* (when he is found out) becauſe it is omitted, is diſallowed? Though this looſe reaſon ſhould followe; yet none *oath* ſhould thereby bee touched, other then miniſtred in matters of *hereſie.* But if he might reaſon thus: becauſe thoſe *Cõmiſſioners* might beginne and grounde their proceedings done by way of

ſpeciall

ſpeciall *enquirie in proceſſu punitiuo*, vpon ſuch *information, accuſation*, or *verdict*; therefore they might not proceede afterward, according to any courſe of the lawe *eccleſiaſticall*: then might he as well alſo argue, that they might not deale vpon an *heretiques* owne *voluntarie confeſſion*. for *confeſſion* is no more mentioned in that *Statute*, then the defendants *oath* is. But what if that Statute had expreſſely diſallowed that oathe, is it not nowe repealed? and is it woorthie to bee alleaged, ſeeing hee elſe-where chargeth it, to be *A bloudie and cruell Statute?* I perceiue it is verie looſe and badde ſtuffe, which hee will not take holde of; where hee may haue but as much as a ſhadowe or glimpſe of any thing to his purpoſe. May it bee thought, that any man of iudgement can bee (in deede) ignorant; but that ſuch ſharpe and pregnant *concluſions*, as throughout his whole *Treatiſe* he inferreth; cannot (poſſiblie) be grounded vpon ſo feeble and vnconſequent *premiſſes?* yet hee ſticketh not vpon theſe allegations aforeſayd, euen as if hee tooke them for good and ſound arguments; *as a well-willer of Ordinaries, to diſſwade them from further practiſe of ſuch oathe; leaſt they bee found thereby, not onely impugners of the Roiall Prerogatiue, but diſcredited further by the breach of their owne oathes, taken to the Queenes ſupremacie.*

Neuertheleſſe, leaſt I be miſtaken by any, it is to be remembred, that he (commonlie) limiteth all his hote concluſions with ſome warie wordes of reſtraint, as theſe, *videlicet, ſuch oaths, and ſuch like, &c.* alwayes conueying vnder them, a reference vnto *generall oathes*, according to his firſt vntrue iſſue. Well, this helpeth his cauſe neuer a deale. for if none of his reaſons brought, doe ſo much as ouerthrow thoſe *vnreaſonable oathes* (which are by no man defended) howe much leſſe can they touche thoſe *particular oathes* to matter in fact onely, that we doe reaſon and treate of?

The reaſons which he ſetteth downe as taken from the Reports of the common law, doe now follow. which are partly by propounding ſome *examples*, how *oaths* be there vſed: & partly by auouching ſome caſes, ſeeming vnto him, to inferre a cõdemnation of *defendants oaths*, in any cauſes *criminal*. Before he come

to the first of these two, there bee sundry conclusions propounded by him: for proofe whereof, all his *reports* out of the *Common lawe*, be laied downe. First, that *he may* (as he saieth) *deliuer our lawes & Iustice of our land from so foule a slander; as that they should bee sayde to allowe of such Catholique oathes:* Next, to assure others (like as himselfe is sure) that *such a generall oathe, or such like ex officio was neuer offered by any Magistrate, nor taken by any subiect, by authoritie of the common lawe.* Thirdly, that *the Common lawes haue not imposed, or appoynted an oath to bee vsed, otherwise then according to the right institution thereof, and the godly rules before* (by him) *remembred:* What those rules are, I haue noted in the *Epistle to the Reader.* Nowe if by these wordes, *videlicet, (such like ex officio)* he meane onely *such generall oathes,* as afore he had (vntruely) imputed to Ecclesiasticall courtes; then will I not trauerse any of these conclusions, whether the oath shall be ministred vpon the *Iudges office* onely, or at a *parties instance.* Yet vpon view of his proofes for them, which shall followe; I would the Reader might be pleased to consider; whether I had not iust cause to put them downe for *bare affirmations* vnaccompanied (in trueth) with any reason. Fourthly, those booke cases are brought, to shewe; that *the common lawes, yea the common wealth it selfe hath euer reiected, and impugned this maner of swearing, whereof wee nowe intreate, as a thing vnlawfull, and iniurious:* But this last wee may not so easilie yeeld vnto him, without betraying the trueth; as we yet (verily) take the matter.

The examples then which hee bringeth in proofe of those conclusions, and withall to shew how oathes bee ministred at the *Common* lawe, are *of witnesses deposing betwixt Prince and subiect, or betwixt subiect and subiect: of defendants waging their lawe in personall actions, with two other swearing with them: which wager is neuer admitted, where there is witnesse (though but one) or matter of recorde, or the parties owne hand writing: of a tenant in a reall action waging his lawe of non summons, for safegarde of his lande, as hauing none other way to relieue himselfe agaynst the false returne of the Shiriffe: Of examining the garnishours, returned (when the plaintife recouereth in a Scire facias by default) vpon an action of deceipt, brought by the defendant agaynst the Shiriffe: and of a Tenant in a Precipe of land, casting an Essoigne*

of

of the Kings ſeruice, where the Eſſoigner ſhall ſweare, that it is no fained excuſe.

Out of theſe being graunted vnto him, I truſt neither hee, nor any *Logician* in the world, ſhall be able euer to drawe any ſound reaſon ſo much as agaynſt thoſe *generall and Catholique oathes*; with which (throughout) hee chargeth *Eccleſiaſticall* Courtes, howbeit very vniuſtly. but much leſſe agaynſt thoſe *ſpeciall oathes* of *defendants* in ſome *criminall* cauſe, whereof wee here intreate. for the reaſon from theſe, muſt thus of neceſſitie be gathered: *theſe oathes are vſed, and are lawfull, therefore the vſe of oaths in any other ſort, is vnlawfull.*

Therefore to preſſe vs yet further by ſome *examples* out of that lawe, hee ſaieth: *It hath wholy forborne to miniſter oathes in criminall cauſes. for that in wiſedome it was foreſeene (by reaſon of mans frailetie) what danger of periurie a man was likelie to fall into for ſafegard of his life, for preſeruation of his libertie, credite, and eſtimation.*

The great preſumption and danger of *periurie*, if a man ſhould be ſworne in a cauſe *Capitall* vnto him, I can eaſily yeeld vnto. and that the ſentence out of *Iob* (to that ende) is very appoſite. but for auoyding ſome reſtraint of his *libertie* for a time, or for the onely retaining of his woonted *credite* and *eſtimation*, that a man which hath any feare of God at all, or but any ſlender ſparke of godlineſſe and true religion; would wilfullie (through *periurie*) throwe his owne body and ſoule into hell; neither *lawe*, nor yet any *nation* in the world, that I can reade of, did euer *preſume*.

And if great likelyhood and doubt of *periurie* be ſo effectuall a *motiue* for all wiſe *Magiſtrates* to forbeare giuing of an oath: then muſt he alſo condemne oaths, in moſt of the ſayde examples by himſelfe afore alleaged and commended. for who is ignorant, but that (in moſt men) there is more danger of *periurie* by ſwearing about *debt* and *detinue* to ſaue their *goods*, then for their *good name*, as is ſomewhat touched[1] afore? Hereupon then all *wagers of lawe*, ſhould bee vnlawfull, yea not onely for getting, or keeping of *goods*; but eſpecially for *lands*, this danger of mens owne *periurie* is apparantly great; in that it is much more common to *ſuborne* others thereunto, for this end; then for

[1] Vide 3. par. c.

preſeruation either of *libertie*, or of *good name* and *honeſtie*, when theſe happē to be likewiſe queſtioned. ſo that, for danger & preſumptiō of *periurie*; the *tenants oath* of *non ſummons* (who is otherwiſe to loſe his *land*) ſhould not be admitted by his owne reaſon.

Againe, if this feare and doubt be ſo forcible and neceſſary a ground of forbearing to miniſter *oath*: then what wil the *Treatiſour* ſay vnto thoſe *wagers of law* allowed of, & made (as by the bookes[1] *of termes & yeres* doth appeare) whereas both the *plaintiffes* were vpon their intention, *examined* by their owne *oaths*; & the defendants alſo were permitted to wage their lawe? doe not theſe *croſſe-oaths* inferre *periculū periurij*, either on the one ſide, or the other (ſeeing thereupon oath may be againſt oath, either directly or by implicatiō) much more then any oath doth, whether it be *general* or *ſpecial*, in *criminall* cauſes, that he or others do impugne? Furthermore in theſe *wagers of law* vpon actions of *debt or detinue*, or in *actions realt*; this danger of *periurie* is inforced, not only by the conſideratiō of ỹ extraordinarie care, which moſt mē haue, of keeping, or getting goods & riches by hooke or crooke; but ſomwhat alſo in regard of their owne worldly credites and honeſtie; if the retaining of that bee of ſuch moment, to induce *periurie*, as the *Treatiſour* imagineth. For when one of theſe *defendants*, hath (a good while) ſtoutly & *publiquely* ſtood in deniall of the matter, for which he is ſued: will he not take it to be a reproch vnto him, to haue it diſcouered (by his refuſal to ſweare) that he hath ſo confidently & ſo long auowched an vntrueth, euen to defeat another man of his due and right? and therefore by all likelyhood, what to auoid loſſe on the one ſide, and ſhame or obloquie onȳ other; wil ſcarcely ſticke, to hazard an vntrue oath.

[1] M.8.H.6.fo.15 H.20.H.6 fo.16. H.22.H.6.fol.43

Laſtly, it is both lawful & receiued by practiſe alſo, when[2] *Iuries* for trials of matters betwixt man and man, or vpon life and death, cannot agree within the time of the abode of the *Iuſtices of Aſſiſes* in that Countie; that then they ſhall be caried along with the *Iudges* in cartes; till they ſhall all condeſcend & agree; and in the meane time they are to bee kept from all meate, drinke, and candle light. and may not this courſe, driue ſuch of them, as cannot ſatiſfie and conforme their owne conſciences to the reſt of their fellowes; to yeeld (at length) euen vnto damnable and wilfull *periurie*, rather then miſerably to famiſh, and

[2] Brooke titulo Iuriſdiction, nu. 105.

to

to periſh for want of foode?

We may therefore conclude, that euery preſumption or perill of *periurie* ought not to be holden ſufficient; to take away the vſe of *oathes* (otherwiſe being expedient) from amongs the ſocieties of men.

The *Treatiſour* bringeth one other example of *oathes*, out of the reports of the *common lawe*: it is the *vicar* of *Saltaſh* his caſe, 2. H. 4. *by which* (he ſaith) *the vnlawfull impoſing* of an oath vpon him appeareth. But it is not any *vnlawfulneſſe* (ſimply) *of impoſing an oath that there appeareth, or which* was condemned by deniall of a *conſultation*; neither was it *impoſed*, but *voluntarily* taken: but it was, for that the *Popes Collector* (who had in *England* no *iuriſdiction*) did conuent the ſaid vicar afore him *eccleſiaſtically* (at the ſuite of the *Deane* of *Windſor*) for breaking his *oath* taken afore the ſayd *Collector*, to performe the condition of an obligation, that he the ſaid *vicar* had entred into, which is a *temporall* cauſe. What then doth this make againſt *oathes* impoſed vpon *defendants* in ſome *criminall* cauſes? For I truſt (though the *Collector* had vnlawfully *impoſed it*) the *Treatiſour* will not thence reaſon thus mightily againſt vs, viz. *This was an impoſed oath in a ciuill cauſe, but it was vnlawfull, therefore all impoſed oathes in any criminall cauſe are alſo vnlawful:* For this reaſon is *ex meris particularibus*, & hath *quatuor terminos:* & beſides, is a *fallacie of the Accident*. Seeing is was not therefore vnlawfull becauſe it was impoſed; but vpon the other grounds alone. Hitherto touching *examples* of *oathes*, alledged out of the reports of the *common* lawe.

Now follow theſe reaſons that are vſed, as for a more direct condemnation (by the *common* lawe) of oathes impoſed vpon *defendants*, in ſome *Criminall* caſes: in which behalfe, the *Note-gatherer* ſaith; that *nemo tenetur ſeipſum prodere, is the common cuſtome of England*. I will not greatly ſticke with him herein, ſo it be truely vnderſtoode. albeit this *maxime* being taken notoriouſly out of the Interpreters of *Ciuill* and *Canon* lawes: I thinke he would haue much a doe to finde it (by any booke of the *common lawe*) to be the *common cuſtome of England*.

It is true, that when a mans owne fault is *ſecret*, and not any way bruted and publiſhed abroad: he himſelfe is not bound by

lawe to make *confeſſion* thereof, to any *Magiſtrate* or *officer Ciuill* or *Eccleſiaſticall*; whether he be vrged to *ſweare* thereupon, or otherwiſe, for in ſuch caſe, it is ſimply *ſecret*, and the *Magiſtrate* (except he ſhoulde miniſter a *generall oath*, like vnto the *Popiſh* charge at ſhrift, not warranted by any lawe) cannot poſſibly in ſpeciall or particular manner interrogate him of that, whereof he neuer heard, nor once dreamed.

But if a man be once diſcouered thereof by *Preſentment*, *denunciation*, *Fame*, or ſuch like, according to lawe: then is not the fault ſimply *ſecret*, but *reuealed* (in ſome ſort) abroade, or to the *Magiſtrate*. who for auoyding *ſcandall to Chriſtian* religion, and for reformation of the partie, may thus *enquire* of the offence, to ſee it redreſſed, and puniſhed. and therefore to the former *maxima* muſt be added thus much; *ſed proditus per denunciationem, Famam, &c. tenetur ſeipſum oſtendere.* Any more exact or further diſcuſſing hereof, is not of this place: I doe [1] therefore referre the reader, to the places of this *Apologie* here quoted in the margent.

[1] 2.part.ca.6.& 7 3.part.ca.9.

The onely caſe carying any ſhewe or colour of condemnation of *oathes* in any cauſe *criminall*, at the courſe of proceeding by common law; is alledged by the *Treatiſour* out of the [a] booke of *Aſſiſes*. there, certaine returned of a *Iurie*, being readie to be empanelled with others, were challenged: *ſome of them, for that it was ſuppoſed they had declared the right for the one partie, and not for the other: thereby* (as it were) *telling their verdict aforehand: And other ſome were challenged to be of Counſel or fee, to the parties.* Nowe it is thereupon further reported; that *ſuch of them as were (in the firſt reſpect) challenged*; were *ſworne to giue euidence to the Iurours: and that it ſhall bee ſo in like caſe, where the challenge ſounds not in reproofe or diſhonour of them. but for thoſe which were challenged, that they had receiued money of the partie; this challenge was tryed by the tryours, without hauing any euidence by their owne oathes, Cauſa qua ſupra.* whereby hee woulde gather, that an *oathe* may not bee giuen in any cauſe at all, where the parties owne *honeſtie* may be touched.

[a] Li. Aſſiſar. 4.9.E.3. Aſſiſ.1.fol.316.

But he might with better reaſon haue gathered (out of ỹ former part of this caſe) the very *contradictorie* hereof, becauſe it is very

ſmall

ſmall *honeſtie*, for any man, (in ſome ſort) to offer himſelfe to be ſworne as *an indifferent Iurour*: when he is (indeede) vnindifferent, & his iudgement ſo foreſtalled; as that he hath taken vpon him to ſcan the right for the one partie, before hee be ſworne, or haue heard the *euidence* for the other. yet neuertheleſſe theſe chalenged perſons were put to *giue euidence* (hereof) *to the Iurours*, vpon their *corporall oathes*.

Cõcerning the other perſons (chalenged to haue *receiued ſome money or fee of the one partie*) that it was thought good, that they ſhould not be *examined* by *oath* hereof; (becauſe it was a matter, that might tend to their reproch and *diſhoneſtie*) cannot inferre this generall concluſion, viz. that in no cauſe whatſõeuer, a man may be put to an oath, whereby his owne turpitude and diſhoneſtie, may be diſcouered. For this was, but in a particular point of *challenge*, where the perſons *challenged* were no *defendants*, but came in to be *Iurours*, a kinde of *tryours* and *Iudges*; and againſt whome, there was no lawfull inducement for the *Iudges*, to impoſe ſuch *oath*; other then the *challengers* owne exception. But that is not ſufficient to caſt ouer the clearing or prooving of the point obiected; vpon him, that is *challenged*, and ſo from the challenger; who (by lawe) is to come prepared, and to make proofes of his owne intention, which hee affirmeth: becauſe *nemo præſumitur malus, donec contrarium probetur*. and therefore the putting of the tryall of the *challengers* aſſertion here, vnto the *tryours*: was a fauour done vnto him, by the *Iudges*: more then the *Ciuill* lawes (vſed abroad in other nations) would haue admitted. For he that will except, muſt (at his owne peril) of looſing the aduantage thereof, without any helpe of the *Iudges office* or of the *parties* owne oath, be able to prooue his exceptions. And therefore, if this very caſe had bene in a *Ciuill* or in an *Eccleſiaſticall* court, that is guided by thoſe two lawes: the parties ſo challenged, yea, though they had bene *Accuſers* or *witneſſes*, and much more being returned for *Iurours*, who are a kinde of *Recuperatores* or *Pedanei Iudices*; ſhould not, ne are bound to anſwere ſuch exception touching their crimes, vpon their owne oathes.

For further declaration of which point, that when an anſwere in a criminall cauſe ought to be made by vertue of a mans oath,

and when it may be refuſed; I referre you to the *ninth Chapter* of this third part. So that the *Iudges* did (herein) very grauely, conſiderately, and but according to equitie, and to the *common lawe* of all other *ciuill* nations.

The *Treatiſours* next obiection to like purpoſe, is out of Iudge [1] *Dyers* booke, and it is in the very booke it ſelfe, thus worde for worde: *A bill of periurie was ſued in the Chancerie, as for periurie committed contra formam ſtatuti anno 5. Regina nunc. and it was doubted, if the defendant would pleade not guiltie, whether he ſhould be ſworne to his Plea and alſo to anſwere to Interrogatories, as is vſed in the Starre-chamber: And it was reſolued by the opinion of Catline, Dyer, Saunders, and Whiddon; that hee ſhould not be examined nor ſworne vpon Interrogatories: except the court of Chancerie had abſolute authoritie, and had vſed to examine periuries in that court, before the Statute: for then this is ſtill reſerued by the laſt Prouiſo of the Statute, as it is alſo for the Starre-chamber: Otherwiſe if the court of Chancerie will examine periurie, committed there (as it may by Statute) this muſt be by Latin Bill, and bee pleaded in Latin, and iſſue muſt be ioyned there, to be tryed in the Kings Bench, as in like caſes is wont.* In this whole report, as there is nothing that tendeth to the abſolute impugnation of oathes, in ſome cauſes *criminall*: ſo is there not any point, which we doe not willingly embrace, and like of. For the *Chancerie* being a court (by the inſtitution whereof) to handle by *Bill* and *anſwere* in *Engliſh*, no crimes but *ciuilly* laide, and not *criminally* mooued, to the intents of any puniſhment: vnto which *Bill*, the *defendants* muſt anſwere vpon their oathes: therefore it is no marueile, when (by Statute) any new authoritie is giuen therunto, as in this caſe; that then the courſe of the *common lawe* ſhould be folowed; except ſuch *Statute* do otherwiſe determine. But hereupon might well be gathered, that defendants oathes to *Engliſh Billes* (there alwayes vſed) albeit *criminall* matters touching their ſhame and diſhoneſtie, be diduced; and in other courts thereunto authorized, the continuall vſe of ſuch oathes, euen for *crimes criminally* mooued: are no way, againſt the *Lawe of the land*. For we ſee, that it is here yeelded to be lawfull, in caſe the *Chancerie* had *vſed* ſuch courſe afore. Alſo that it is vſuall and lawfull in the *Starre-chamber*: and that theſe *Iudges* opinions

[1] 12. Reg. Eli. fol. 288. titul. Periurie, nu. 51.

opinions reach no further; but that the partie *accuſed* of *periurie*, ſhould not be *examined* by oath, vpon *Interrogatories* in the *Chancerie*, for anſwering of *Interrogatories* vpon oath, is not vſed there; no not when the *crime* is but *ciuilly* proſecuted; except the other partie will be contented, to be wholy concluded by his aduerſaries anſweres, that ſhall be ſo made, to his *Interrogatories*.

Another caſe at the *common lawe* is alleaged by the [1] *Notegatherer* thus: *It appeareth* (ſayth he) *by the Lord Dyers booke, that one Hinde being called before the Commiſſioners Eccleſiaſticall*, for *vſurie; refuſed to ſweare; whereupon he was committed; but vpon an Information in the common Pleas, he had a Corpus cum cauſa, to remoue him: ſo (as it ſeemeth) that the Iudges were then of opinion that the Commiſſioners could not then giue them any ſuch oath.* hereof he giues vs not any direction to finde out the particular place of this report. All that I can (to any ſuch effect) hit vpon; is onely this marginall note, viz. *Simile M. 18. fol. per Hynde qui noluit iurare coram Iuſticiarijs eccleſiaſticis, ſuper articulos pro vſura.* ſo that if this be the place; being but a *Marginall note*, it can not (neceſſarily) be fathered, as a Report of the *Lord Dyers*; the rather, becauſe it is not likely that he would terme *eccleſiaſtical Commiſſioners*, by the name of *Iuſticiarij eccleſiaſtici*. for the perfitnes thereof it might ſeeme rather, to bee ſome note of the *Notegatherers* owne, then any of Iudge *Dyers* gathering. Secondly, here is no mention of *Hindes commitment*, nor of *corpus cum cauſa*, nor that the ſayd *writ* (vpon information) was graunted out of that *court of common Pleas*: ſo that theſe bee but the *Notegatherers* owne ſurmiſes and geſſes. Thirdly, before it might bee inferred thereof, that the Iuſtices then were *of opinion, that Commiſſioners Eccleſiaſticall might not giue any oathe in a matter of vſurie*; and ſo by like reaſon (as hee gathereth) in none other *criminall* cauſe: this caſe in the Margent muſt firſt bee made like vnto that caſe, which is in the text it ſelfe. Nowe that conteineth no more, but that one *Skrogges appearing before certaine ſpeciall Commiſſioners by her Maieſtie appoynted to heare and determine the validitie of two ſeuerall Patents of an Office*; *the one graunted*

[1] Notes, tit. the lawes of Engld.

to the ſayd Skrogges, and the other to Coleſhill; and refuſing to make any other anſwere, then a demurre vpon the Bill, and to the Iuriſdiction graunted them, by that Commiſſion; and being committed to the Fleete for ſuch contempt by the ſayd Commiſſioners; was neuertheleſſe by a Corpus cum cauſa, out of the common Pleas, remooued from priſon, becauſe he was a perſon belonging to that court, and a neceſſarie member thereof. But where doeth it appeare, that this *Hinde* was likewiſe a *member of that court?* Or howe can theſe be like caſes; when as in *Skrogges* cauſe, none *oath* was vrged, neither was the *Plea* betwixt him and *Coleſhill criminall*; as this was betwixt the *office* of the *Commiſſioners*, and *Hinde?* Or where may *Hindes* caſe at large be found in *Michaelmas* Terme 18. Eliz. ſeeing no ſuch matter is in the L. *Dyers* reports of that yeere? Or howe can it be made to appeare; that the *Commiſſion Eccleſiaſticall* was then peruſed; the Statute whereon it is grounded, conſidered of; the whole matter argued, and debated; any ſuch opinions yeelded; or yet that *Hinde* was not by the court ſent backe againe to priſon (though it were admitted he had once ſuch writ) as many other (in like caſes) before, and ſince that time, haue bene? for all the ſimilitude, which that *Note* mentioneth; might reſt in this one onely point, viz. that as the one being committed for *contempt*, by vertue of the *Queenes* ſpeciall *Commiſſion*; had notwithſtanding, his writ of *Corpus cum cauſa*; ſo the other had it likewiſe graunted.

But there might alſo be (in the eighteenth yeere *of her Maieſtie*) other good cauſe, to deliuer *Hinde* clearely out of priſon, being called before the *Commiſſioners* into queſtion for *vſurie*, if it were not aboue tenne in the hundred. and yet *oathes* in any criminall cauſe beſides, miniſtred by *Commiſſioners Eccleſiaſticall*; ſhall be no whit thereby impeached, or preiudiced. becauſe afore that, viz. in the thirteenth yeere of the Reigne of her *Maieſtie*, a [1] *Statute* was made; forbidding any puniſhment, then that which is conteined in that Acte, to bee inflicted by *lawes Eccleſiaſticall* vpon *vſurers*; ſo their *vſurie* amount not aboue the rate of ten in the hundred for one yeere. therefore it might well haue bene, that *Hinde* was ſo deliuered from his *commitment*; not in reſpect of any vnlawfulnes by the *Iudges* deemed to be in ſuch *oath*; but for that ỹ *conſſance*

[1] 13. Eliz. ca. 8.

and

puniſhment of his *crime* (by reaſon of that Statute) belonged not then, and in that caſe, to an *Eccleſiaſticall* Court.

This point the *Treatiſour* further enforceth alſo; by the *formes* of a peece of a *precedent* of a *prohibition*, and another of *Attachment* thereupon, layde downe in the printed *Regiſter*; eſpecially by theſe wordes of them; *Recognitiones & ſacramenta, pro voluntate ſua; & ipſis inuitis.* For full anſwere whereof, to auoyde vnneceſſarie length and vaine repetition; I muſt referre the Reader ouer vnto the xj. and xij. Chapters, in the firſt parte of this *Apologie.*

He affirmeth alſo: that *the practiſers of ſuch oathes, are for that cauſe in a Præmunire*; and therefore gathereth, the oathe to be *contrary* and *repugnant* to the *common lawe.* I graunt the conſequence to be good and ſound: but how doth hee prooue them to be thereupon in a *Præmunire?* For proofe of this, he aſſumeth; that this manner of *oathe* is contrary to the *Queenes regalitie and crowne.* as if his reaſons afore brought, had ſufficiently euinced ſo much, which wee doe vtterly and reſolutely deny vnto him. And yet, as if he had fully cleared that point; he addreſſeth himſelfe to prooue that; whereof there was leſſe controuerſie, viz. that what is done by a *Biſhop*, or by an *Eccleſiaſticall Court*, againſt the *Kings regalitie and crowne*, hath beene heretofore adiudged to be within the compaſſe of this worde *Alibi*, contained in the Statute of *Præmuuire 16. Ric. 2.* For this he alledgeth two books of the common law: yet [1] the firſt of them, doth but ſpeake of an *excommunication by a Biſhop*, & not of euery dealing whatſoeuer in a matter belonging to the *Kings regalitie.* And what if it had beene twiſe ſo adiudged; both of them in ſuch corrupt times, when as the *royall prerogatiue* of the *Kings* of this land, *to be Supreme Gouernours in all Iuriſdiction Eccleſiaſticall*, due to them in right and by Gods Lawe; was not *de facto* vnited to the crowne. For the *Biſhops* then, did not claime their *Iuriſdictions Eccleſiaſticall*, next, and immediately vnder God, from the *Crowne*, as now they doe. But ſeeing this parte of *Regall power* is nowe no leſſe truely and fully veſted in the crowne, then is the *Temporall*; ſo as the Lawes allowed for the gouernement *Eccleſiaſticall* are termed by ſundry *Parliaments*, *The Queenes Eccleſiaſtical lawes*, and, *Lawes of the Realme*; as well as thoſe which were firſt and

[1] 5. Ed. 4. fol. 6. Præmunire.

originally made heere. And the Biſhops are proued to haue their authoritie, and *Iuriſdiction Eccleſiaſticall*, deriued downe vnto them from the Queenes Highnes, vnder the great Seale of *England*, as vpon ſundrie incident occaſions hath beene ſhewed afore: Is it then the like reaſon ſtill, to compriſe their *Iuriſdictions and Courts*, vnder that word of *Alibi*; as if their *Courts and Iuriſdictions* were not nowe the *Queenes*; nor yet belonging vnto her *Regalitie*? Nay, let ſuch as ſhall ſo affirme, beware they incurre not (hereby) the danger of *implied*, if not *direct* denyall; of a part of her Highneſſe *Royall ſtile*; and the breach alſo of their oathes taken, for aſſiſtance and defence of all *Prerogatiues, &c. vnited or belonging to this Imperiall crowne*. Yea, and though this might be truely verified of *ordinarie Courts Eccleſiaſticall*, yet is there no colour at all ſo to affirme; of the *Commiſſion Eccleſiaſticall*, exerciſed vnder the great Seale of *England*, by force of the ſame Statute, that reſtores the *Supremacie Eccleſiaſticall* to the *Crowne*. I omit here, what is touched elſe where, viz. howe by ſundry learned, it hath beene thought; that by *Alibi*, there was encluded or meant nothing els; but matters of that quality there ſpecified, which were enterpriſed by, and vnder the *Papall authoritie*; though the *Pope* (perhaps) reſided not then at *Rome* it ſelfe.

Therefore (ſeeing this is not pregnant ynough for him) to driue this matter neerer home to his purpoſe; hee ſayeth it is againſt the *Kings Regalitie*, and ſo a *Præmunire for an Eccleſiaſticall Court to holde plea of a matter appertaining to the Iudgement of a Common Lawe Court, or to deale in any cauſe not belonging to Eccleſiaſticall Iuriſdiction.*

The firſt of theſe he prooueth; by the pardon ſued by *Barlow* Biſhop of *Bathe* and *Welles* in king *Ed. 6.* his time; by reaſon hee had depriued the *Deane* there, being a meere *donatiue* of the *Kings*. If there were but any probable doubt, whether (thereby) hee were fallen into a *Præmunire*; it was wiſedome for him, to procure a pardon (afore hand) if he could. *Alea litis, res incertiſſima.* yet depriuing of one, placed by the *King*; is much more then bare holding of ſome plea, that appertaineth to a *temporall* Court: beſides that there was a further matter in it, then I luſt here to open.

The

The other allegation of his to like ende; taken from a [1] *Statute*, doth make no ſhew of proofe thereof: for it is but thus, viz. *the King chiefly deſireth to ſuſteine his people in tranquilitie and peace, and to gouerne according to the Lawes, Vſages, and Franchiſes of his land, as hee is bound by his oathe, made at his coronation.* And are not *Eccleſiaſticall* perſons nowe parte of the *Queenes* people? Are not the *Liberties* and *Franchiſes*, that bee giuen and confirmed vnto them, by *the goodneſſe of Princes*, for holding *plea* in certaine matters, the *vſages of this Realme?* Are not the receiued Lawes, which lawfully they may practiſe, termed *Eccleſiaſticall Lawes of this Realme*, no leſſe then *temporall* be? And is not the *Prerogatiue royall*, in and for cauſes *Eccleſiaſticall* as high, and as rightfully ſetled in the *Prince*, and incident to her Highneſſe *Crowne* and *Regalitie*; as the ſame is, for temporall power and authoritie? What cauſe is there then, ſeeing *ſen Alibi* in the Statute; ſignifieth (in true conſtruction) anie place whatſoeuer beſides *Rome:* that euery holding *plea* by an *Eccleſiaſticall Court* of a matter wherein it ought not to holde; ſhoulde at this time bee reckoned, a thing contrarie to the *Queeenes Regalitie*; more then dealing in an *Eccleſiaſticall* cauſe, ſhoulde bee in anie *temporall* Court at *Weſtminſter?* For no Statute of *Prouiſion* or *Præmunire*, aſſigneth theſe for cauſes; which haue (indeede) but growen ſince by collections; whiles the *Popes vſurpation* was continued in this land; againſt which (oftentimes) the remedie by *Prohibition*, coulde not ſerue the turne. I graunt it is a *contempt* or great *miſpriſion* in any. but for this, a *Prohibition*, and *attachment* thereupon &c. (as afore thoſe *Statutes* they did) might ſufficiently ſerue the turne. Neuertheleſſe, all theſe matters are wholly impertinent to his purpoſe, till he ſhall haue prooued; the particular iſſue, viz. that ſuch oathe (as wee treate of) is againſt the *Queenes Regalitie, &c.* But if that might be prooued; then vpon ſo generall interpretation of *Alibi*; theſe oathes would fall into the caſe of *Præmunire*; by what *Court* ſoeuer, whether *temporall* or *Eccleſiaſticall*, they ſhould be tendered.

[1] 38 Ed. 3 of Prouiſours.

And that which he vowcheth to the ſame effect, out of *Saint Germans* booke of *Doctor & Student*, receiueth the like anſwere.

In the next place, I ſet ſome of the *Treatiſors* reaſons, that are

are made by *collection*, and *discourse* of reason. These collections he maketh partly from *examples* past; and partly at large. therefore touching the first of these two: he impugneth these oathes, and would proue the *Imposers* of them to be in a *Præmunire*, for *incroching vpon the Kings rights and prerogatiues: and for conuenting subiects by forrein made Lawes:* and *for practising Antichristian Decrees, and Popish Canons:* which (hee sayeth) appeareth, by the *Præmunire* brought by *Hunne*, against a *person* suing the said *Hunne* for his yoong deceased infants bearing-cloth (by the name of a Mortuarie) in an *Ecclesiasticall* Court. howe doth this inferre, that it is *Præmunire*; either *to encroch vpon the Kings rights & prerogatiues*, (though this peraduenture by some circumstances may amounte sometimes to no lesse) or to conuent subiects by foreine made lawes? It may not be thought, that euery *intrusion*, *deteiner*, or *concealement* (which is incroching vpon the *Kings right*) or rauishment of his wardes, which hee ought to haue by his *Prerogatiue Royall*; is straightway, and necessarilie a *Præmunire*. neither were the *Kings Temporall Courtes* (in this case) encroched vpon; because they could not giue remedie for deteining a *Mortuary*, if this were so (in trueth) to be accounted. neither yet is there so much as any mention made of *foreine lawes*, which the *Ecclesiasticall Court* then proceeded by, or practised.

This course of the *Treatisour*, is rather to propheſie, then to reason; thus to tell vs afore hand, vpon the very bringing of the action of *Præmunire* by *Hunne:* what the *iudgement* was in that matter. yea, and vpon what ground the iudgement was giuen in a cause, which neuer receiued *iudgement*, for any thing I can learne.

To this point, he also mentioneth the *Præmunire* wherein blind *Nixe* sometimes Bishop of *Norwich*, was condemned, and addeth to the aforesaid two points; that by that also appeareth; *Iudges Ecclesiasticall* are in *Præmunire*, *whensoeuer they exceede their Iudiciall authority*. But if euery exceeding of authoritie were a *Præmunire*; then what *Iudge* is there of any *court* (of either sort) so skilfull, or alwayes so aduised; but might iustly feare that at one time or other he shall not escape this rigorous doom of *Præmunire?* In trueth, this *example* proueth all his three points, iust alike;

alike; that is, none of them at all. I doe verily beleeue, the *Treatiſour* neuer ſawe that *Record*. if he haue, either he makes verie bolde with his *Reader*, or elſe with the Arte of *reaſoning*, *thus to collect*.

I haue peruſed the *Record*[1] it ſelfe: it containeth a ſuite of *Præmunire* brought againſt the ſaide Biſhop by the Kings *Attourny generall*, on the *Friday* after the *Purification*, pleading the *Statute* of *16. Ric. 2*; and adding, that al Indictments, Preſentments, and Impetitions in any court of the Kings, [2]*or in any Court of a ſubiects (which is in any ſort derined or diduced from the King (crowne)* duely taken or found, are to be tried & iudged in that Court, where they were found, or in ſome of the Kings Courts; and not in any *Eccleſiaſticall* Court: and that, whereas there was an old cuſtome in the Towne of *Thetford*, that whoſoeuer ſhould trouble any of the *Kings* or Duke of *Lancaſters* tenants, commorant in that Towne, and ſhoulde call them by *citation* into an *Eccleſiaſticall* Court, out of the *Deanery* of the ſaide Towne; ſhoulde thereby forfeit, and he alſo that ſhould execute ſuch proceſſe ſhould alſo forfeit 6 ſhillings 8. pence. which cuſtom, by a *Iurie* of twelue men, being (accordingly) preſented before the *Maior*, the ſaid *B. cited* the *Maior* & two others to appeare perſonally before him, in his Mannor and Chappell at *Hoxne* or *Hoxſtone* in *Suffolke*. The *Maior* and the one of the other two appearing; and hauing nothing obiected but that *preſentment* made; were by the *B.* enioyned, vpon paine of *excommunication*, at the next court of the Kings to be holden in *Thetford*; to call the ſame *Iurours* together, and there publikely to adnull and reuoke the ſaid *preſentment*, as being againſt Gods Lawe. ſo that (ſaith the Record) the *B.* did in an *Eccleſiaſticall* Court, iudge of the *preſentment*, being duely made in the *Kings* court: and enioyned the reuoking and diſanulling of it, againſt the *King*, his *regalitie*, *crowne*, *&c.* whereupon immediately, the *Biſhop* appeared, and deſired libertie of *imparlance* till *monday* next after; and had it graunted, vpon good mainpriſe, &c. On the prefixed *monday*, the *B.* appeared againe; and ſaid he could not deny, but that he was culpable in all the premiſſes, & put himſelfe thereupon, into the Kings hands, &c. & ſo had *iudgement* to be from thenceforth out of the *Kings protection*, and al his lands and tenements, goods & chattels to be

[1] H. 25 H. 8. Rot. 42. Suffolk.

[2] B. Nixe his condemnation in a Præmunire.

forfeited to the King; and that he ſhould remaine in the cuſtody of the *Marſhall, quouſq; &c.* but preſently (vpon ſpecial grace of of the Court) he was let to *baile*, in a far leſſe ſumme then afore, for his appearance in *Easter* terme next after. At what time hee appeared by his *Atturney*; and both he and his pledges were diſcharged, by vertue of an Act of *Parliament* made the ſame yeere.

Whereby wee may ſee, that *encroching vpon the Kings rights, &c.* is not heere ſpecially aſſigned, for any cauſe of ſuch *iudgement*; and much leſſe, is the *practiſing* of any *Canons*, or *forreine mad: Lawes*; for they are not once mentioned: and leaſt of all, that euery *exceeding of their authoritie by any Court*, ſhoulde be a *Præmunire*. For the *originall* and onely cauſe hereof was; the *B.* enioyning of the *Maior*, and of another townesman of *Thetford*, vpon paine of *cenſures*; to *adnull and make voyde a preſentment, firſt duly made, in a temporall Court of the Kings.*

It is alſo to be noted out of the *generall Atturneys* bill in this Record: where it is ſaide, that *preſentments, &c. found or made in the Kings, or in a ſubiects Court, which is (in any ſort) deriued from the Kings crowne, muſt be tried there, or in ſome of the Kings Courts, and not in an eccleſiaſticall Court:* that at this time, Courts *eccleſiaſticall* were not holden to be *deriued* any way from the *Kings Crowne*, as nowe they are, and ſo bee acknowledged. and (indeede) by conferring the times, I finde, that this fault of the *Biſhop* was done in *Nouember 24. H. 8.* hee was attainted in *Hilarie* terme *25. H. 8.* which is a yeere and more after, and it was in a *Parliament* time, that was continued till *30. Martij* next after. Now the *ſupremeheadſhip* ouer the *Engliſh Church*, was not yeelded vnto the *King*, vntill the Parliament (by prorogation) holden the third of *Nouember*, then next following, viz. *26. H. 8.*

That which the *Treatiſour* collecteth by *Cardinall Wolſeys Præmunire*, and the whole Cleargies alſo; for aſſenting to, and aſſiſting the Court *Legatiue*, which the ſaide *Wolſey* had erected; hee himſelfe doth ſufficiently confute: for albeit hee doe affirme; that *Wolſey* was in a *Præmunire for preiudicing but eccleſiaſticall Courtes, and not the Kings*; and thence gathereth thus: *How much more thoſe, which practiſe Antichriſtian Lawes, and Popiſh Canons, repugnant to the royall Maieſtie, and policie of this land?* yet doeth hee (by implication) contrary his owne ſaide affirmation;

affirmatiõ; in that he confeſſeth, *Wolſey did grant beneſices* by way of *Prouiſion*. for thereby, he was within the very letter of the Statutes of *Prouiſion*, and *Præmunire*; and ſo conſequently, he preiudiced alſo *the Kings regalitie and crowne, and not Eccleſiaſticall courts alone.*

Yea, and what is all this to the impoſing of an oathe, that we treate of? ſeeing (if it were true, that euery practiſe of *Antichriſtian decrees*, and *Popiſh Canons*, were a *Præmunire*) yet it may be truely affirmed, that the very *temporall* Lawes of this Realme, do allow vnto *Eccleſiaſticall* Courts to miniſter ſuch *oathes* (as ſhall be prooued in the next chapter) & therefore not to be ſaid to be practiſed by vertue of *Canons* only. And alſo, for that no *Canons*, that are agreeing to thoſe conditions, and qualities which are required by the [1] Statute of *Submiſſion of the Cleargie*, are *Antichriſtian*, or *Popiſh*, or *foreine Lawes*; but are the *Queenes Eccleſiaſticall Lawes, and Lawes of this Realme*; no leſſe then ſuch as were *originally* made within the land, as is afore (by occaſion) [2] ſhewed and prooued. Inſomuch, as the *Note-gatherer* himſelfe calleth them *the eccleſiaſticall Lawes of England.*

[1] 25. H. 8. 27. H. 8.

[2] Vide 1. part. ca. 14. pag. 102. & 103.

Hee alſo telleth vs, as to this purpoſe of a complaint by the Commons made *21. H. 8.* vnto the ſaid King touching grieuances by the Clergie offered: but telleth not, that it was this matter; nor how iuſt or vniuſt the complaint was found to be; nor yet of any remedy therein giuen. He diſcourſeth alſo of the particulars of an other complaint likewiſe made *23. H. 8.* but hee doth not aſſigne *oathes* tendered in ſome *criminall* matter, to be any part of that complaint. The *Note-gatherer* ſaith, the *L. Audley* then choſen *Speaker*, did exhibite it; and that it was for proceeding *ex officio*: albeit the *Treatiſour* do tell vs, of many points beſides; which (belike) if he had pẽned that complaint, it ſhould haue conteined: This I haue anſwered in the ſecond part of this *Apologie.*

Another reaſon by way of collection, the *Treatiſor* maketh at large thus, viz. *What if a Iuſtice by colour of his office, ſhould offer this generall othe, to anſwer to all he will aske, & commit the partie refuſing; coulde any man iuſtifie his doing; but rather crie out againſt him, as a ſubuerter, &c?* Well, howe ſtrange a courſe ſoeuer hee maketh this, and therefore ſo *cryeth out*; neuertheleſſe it may bee, that little better hath beene vſed by ſome *Iuſtices* of *Peace.*

But I neither accuſe any thereof, nor wil excuſe either them or any others, which ſhal ſo deale; either from the *Treatiſors*, or from any other mans *outcries*: ſo that (in this point) we both agree.

But in one part of his *Treatiſe*; he gathereth alſo thus, againſt practiſing of *Canons*, in miniſtring *oath*: *No Canons*[1] *may be practiſed but ſuch, as be not contrary nor repugnant to the Prerogatiue royall, nor to the lawes and Cuſtomes of this Realme: but this Canon Law, is not any part or portion of ſuch lawes.* Whereupon it ſeemeth he would haue his Reader to conclude; that no *Canon* at al may be practiſed. Firſt it is vntrue (if you take the *Canon* Law indefinitely for all *Canons*) abſolutely and indiſtinctly to ſay; that it is no *portion of the Lawes and Cuſtomes of this Realme*, as hath bin afore ſhewed: yea, there was here an *vſe* and *cuſtome* thereof, long afore it was accounted *any parte of the Lawe of the Realme*. Secondly there be *quatuor termini* in this reaſon. Laſtly, it conſiſteth all of *Negatiues*; In both which reſpects, it is vtterly inconcludent.

[1] 25.H.8.ca.19.

So that by all hitherto deliuered wee may perceiue; that albeit there bee ſome *diuerſitie* in ſundrie the courſes of proceeding, betwixt the *Eccleſiaſticall*, and the *temporall* Lawes: yet there is found not ſo much as any great *diuerſitie* in the very point; which is of miniſtring *oathes in certaine criminall cauſes*: and much leſſe, is there any *contrarietie* or *repugnancie* in that behalfe.

Beſides, there is not ſo great *diuerſitie*, betwixt any part of the law *Eccleſiaſticall* (being now of force within this Realme) and the Lawes *temporall*; as is betwixt ſundrie points of the cuſtoms of *London*, the cuſtomes of the *Stanneries*, the cuſtomes of *Kent*, the cuſtomes of *Halifax*, both in trying and executing offendors, and by dealing by vertue of the *Queenes Inſtructions* at the *Counſell* of the *Marches* of *Wales*, on the one ſide: and betwixt ſundry parts of the *Common lawe*, on the other ſide: as might (but for auoiding of tediouſnes) by ſundry particulars, be exēplified. & yet none of thoſe which practiſe thē; are by reaſon of any ſuch notable *diuerſity* only, thus threatned with danger of *Præmunire*.

In the laſt ranke of matters brought by him to this purpoſe; I doe marſhall the *Treatiſours* ſhifting anſweres, vnto ſuch *obiections*; as himſelfe imagineth will be, or may be made by thoſe, who

who defend this kinde of oathe, whereof we are now treating.

Firſt, to the *obiection* made, of the *like oathes miniſtred to defendants in cauſes criminall, both in the Courts of Starre-chamber and Chancerie:* he anſwereth, that, *if it were graunted, that the like oathes be there vſed: yet would it not followe, that the ſame might be practiſed in courts Eccleſiaſticall.* and why would it not followe? *vnleſſe* (ſayth he) *the like allowance thereto, and conſent of the whole Realme, might be prooued.* Belike, if it were not moſt euident; he would alſo denie the like *oaths* to be vſed in thoſe two courts. The *whole Realme* is ſayde to allowe, and to conſent vnto that, which is enacted by *Parliament.* Shall the ſame courſe then vſed alſo in the *Chancerie*, that hath none Acte of *Parliament* to eſtabliſh it, be vnlawfull in his iudgement? for hee cannot ſay, that the *whole Realme*, either *indeede* or *repreſentatiuely* hath giuen conſent hereunto; albeit the *preſcription* thereof be moſt ancient; becauſe al & euery one in particular, haue not had from time to time, *iudiciall* matters there. But yet, ſince this *preſcription* is good; and will ſerue to mainteine that courſe there: why ſhall it not alſo alike ſerue for *Eccleſiaſticall* courts, which haue reteined the practiſe of ſuch *oath*, beyond all memorie of man, and beyond moſt *Records* nowe extant?

Neuertheleſſe, there be alſo Acts of *Parliament* to warrant the practiſe of theſe *oathes* in *courts Eccleſiaſticall*; vnleſſe they could be prooued; to be either *contrary or repugnant to the Prerogatiue Royall; or elſe to the Statutes, lawes and cuſtomes of this Realme.* Neither yet are the examples of *Starre-chamber* and *Chancerie*, to any other ende by vs alleaged: but thereby onely to ſhewe; that ſuch *defendants oathes*, inferring confeſſion of ſome his owne *crimes*; is neither to be holden *vniuſt*, *vnlawfull*, *vnequall*, *barbarous*, *cruell*; nor yet *Antichriſtian* or *Popiſh*, as they be challenged.

For a ſecond anſwere hereunto, he ſayth: that, *examples and Precedents be weake, where an expreſſe lawe, or certaine policie, is to the contrary.* as if he ſhould ſay, though theſe two high *Temporall courts* doe practiſe it: yet is it *contrary to an expreſſe lawe, or certaine policie.* for elſe, he ſayth iuſt nothing to the purpoſe. and yet he doth no leſſe *dutifully* ſay it; then he prooues it *ſubſtantially*; euen out of *the Ciuill lawe.* viz. *ius non ex regula ſumatur,*

ſed ex iure quod eſt, regula fiat. I pray yee, who euer heard afore, that *regula* here ſignifieth an *example*, or a *Precedent*. The true vnderſtanding therefore of that part of *Ciuill* lawe, is this: when many caſes runne one way, ſo that (for roundnes, or better memories ſake) they haue bene (by *Iudicious* men) contriued into a *ſummarie rule*: then whatſoeuer might be compriſed vnder the generalitie of the words of ſuch *rule*, was not ſtraight way to be reckoned for *lawe*. becauſe it is not poſſible (in this great weakneſſe of mans wit) ſo to comprehend the lawe, being to guide ſuch infinite varietie of mens particular externall actions in a briefe *rule*; as that it ſhall not haue ſundry *exceptions* and *limitations*: and therefore *rarò eſt quin regula fallat*. And againe in this place, *non ex regula ius ſumitur, &c.* that is, you can not conclude it neceſſarily to be *lawe*: becauſe you may apply vnto it, ſome *rule* of lawe: but becauſe the lawe runneth accordingly in ſundry caſes: you may therefore conueniently drawe them into a ſhort *rule*, which ſome doe call *maximes* in lawe, yet abuſiuely.

Thirdly he ſayth to this obiection: that *by better Logicke we might conclude* thus, viz. *becauſe in theſe two courts, anſweres bee put in vpon oath; therefore the ſame may be vſed in the Kings Bench, and common Pleas: which neuertheleſſe were an abſurde concluſion.* No Sir, it is ſo farre from *better*, that it is not any *Logicke* at all ſo to conclude; except you adde more vnto it. for if you could truely adde, that the *Kings Bench* and *common Pleas* had time out of minde vſed that courſe for anſweres to Billes in *crimes* not capital, nor tending to mutilation of limme; which may be verified of courts *Eccleſiaſticall*, beſides the direction of that lawe, by which they proceede: then, with very good *Logicke* might you conclude thus: *the ſame courſe hath time out of minde bene vſed in all thoſe courts*, and it is not *vniuſt* nor *cruell* &c. in the one, and therefore not in the other. for the diuerſitie of places where they ſit, nor diuerſitie of perſons which doe ſit as *Iudges*, nor any other like circumſtance; cannot make a matter *iuſt* and *equall*, if (in his owne nature and ſimply) it were *vniuſt*, *cruell*, or *barbarous*, as this is often by him, and others challenged to be.

Fourthly he ſayth, that *in the Starre-chamber, there is a bill of complaint*

complaint formerly exhibited: and ſo be there *Articles* in an *Eccleſiaſticall* court.

Fiftly, that, *there is alſo a knowen accuſer:* Not alwayes an *accuſer*; for the *office* or common *Intereſt* of the *Prince* (whoſe the court is) oftentimes is there excited & ſtirred vp by her *Maieſties Atturney* or *Solicitour*; without any danger of them, to be puniſhed, or condemned in charges, though the matter ſhould not fall out fully againſt the defendants: euen as it is in *courtes Eccleſiaſticall*, when they proceede of *Office*. albeit theſe more often proceede, hauing a priuate *Proſecutour* (eſpecially in the court of *Commiſſion*) then they doe *ex mero officio*.

Sixtly; that, *in the Starre-chamber, they haue a copie of the complaint*: yet he himſelfe doeth limit it thus, viz. ſo it be not *ore tenus*. Well then (vpon ſome good occaſion) it is none vniuſtice; though the defendant want a *copie* altogether, of the matter obiected, but in all *ordinarie* courts, and in the *Commiſſion Eccleſiaſticall* (at the furtheſt when they haue anſwered the articles) they haue *copies* of them.

Seuenthly, *in the Starre-chamber, the defendants are allowed counſell in anſwering the Bill:* and yet, when this is *ore tenus*, he knoweth they cannot haue counſell, neither are they there allowed any counſell for anſwering to *Interrogatories*; nor yet to haue a copy of them, til they haue fully anſwered to them. which *Interrogatories* vpon *crimes* in that court, haue a correſpondence vnto *articles criminall*, preferred in *Eccleſiaſticall* courts.

Laſtly, (ſayth he) *in the Starre-chamber, if the Interrogatories be impertinent; the defendant (without offence) may refuſe to anſwere them:* and ſo may he refuſe alſo to anſwere ſuch *articles* in an *Eccleſiaſticall* court. But who ſhall then iudge, whether they be impertinent, or not? ſhall the partie himſelfe? no verily, but, (as it is in the *Starre-chamber*) the court it ſelfe: or elſe ſome of them that are skilfull in lawe; being thereunto required by the reſt.

Whereupon, what great difference there is in any *circumſtance*, much leſſe in matter of *ſubſtance*, betwixt the proceedings in theſe courtes, may eaſily be conſidered: howſoeuer he doe largely conclude thereupon (after his olde maner) that there be *mightie* and *great* diſſimilitudes. For in his concluſion hereof,

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he encludeth alſo other differences more bitterly, and not ſpoken of at all in any his premiſſes, whereupon he inferreth it, albeit that ſuch his additions be alſo very vntrue: as that, *Eccleſiaſticall courts giue oathes without all courſe of iudgement: that the oathes there, are made ſuddenly, without all diſcretion; vpon vncertaine demaunds: that their oathes doe fooliſhly wander, at the doubtfull will of a ſubtil and ſlye oppoſer: and that the oathe in Eccleſiaſticall courtes, conſtraineth the reuealing of wordes, deedes, and thoughts, though neuer offenſiue to any.* Belike then, where others be *offended*, he mindes and will not ſticke to allowe vnto thoſe courts, the miniſtring euen of theſe *generall oathes:* which he ſo often (beſides the purpoſe) harpeth vpon.

Let vs then lay aſide theſe imputations (being vtterly vntrue) which hee coucheth together in his concluſion, made of this point, viz. concerning the like courſe obiected to be vſed in the *Starre-chamber.* what then doe all, or any the former *differences* of proceeding by him noted; betwixt the *Starre-chamber*, and *courts Eccleſiaſticall* make, to prooue the vnlawfulneſſe of miniſtring an *oath* in a *criminall* cauſe, which is the matter onely in iſſue here betwixt vs? yea, though they were admitted to bee (indeede) *differences*, which is ſhewed, to bee farre otherwiſe? For albeit, theſe courts ſhould differ in many other points, yet ſuch *difference* cannot prooue an equitie to bee in the very like *oath*, when it is vſed in the *Starre-chamber*, and an iniquitie to be in it, when an *Eccleſiaſticall court* doeth (in the like caſe) miniſter it. Truely, he might out of thoſe differences as wel conclude thus: the *Starre-chamber* is kept, and the oath is miniſtred at *Weſtminſter:* and they haue in that court, but three or foure *Atturneys:* therefore the very like *oath* miniſtred in the *Conſiſtorie at Paules*, where there be a dozen *Procurators* ſometimes preſent, is *vniuſt*, and vnequall. This therefore falleth into that point, which (in the Epiſtle to the Reader) I affirmed to be his *ſophiſticall* anſwering of *obiections.*

He alſo doubteth, that the Statute authorizing *the attaching of heretikes by Ordinaries*, made 2. H. 4. ca. 15. which he termeth, *the twiſe damned, and repealed Statute, and a bloody and boyling Lawe*: will be alleaged, for prooſe of theſe oathes. In trueth wee ſhould be brought to a very ſtraite exigend; if we were forced

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(as he is) to runne vnto ſuch *repealed ſtatutes*, for proofe of any principall point in controuerſie.

Yet let vs ſee howe he aſſayeth to vntye this knot; which he doeth two wayes. Firſt he ſayth, *it appeareth not; that thereby any authoritie was giuen to impoſe any ſuch generall oath*. if then no ſuch thing *appeare*, why doth the *Notegatherer*, ſo confidently, and ſo often affirme; that this *oath* was then firſt brought in and eſtabliſhed: and therefore hee calleth that, the ſtatute *ex officio*, though *ex officio* or oath be not once named there? thereby confounding the very courſe of proceeding, with that one *Act* thereof, viz. of *miniſtring an oath*. Repugnancie betweene the Treatiſour and Notegatherer.

The *Treatiſour* goeth further, and ſayth; *it appeareth not, that any authoritie was thereby giuen, to compell by oath, the priſoner to become his owne Accuſer: for that (and eſpecially in cauſes of life and death) had bene againſt the lawes and iuſtice of the land*. By which reſtraint in this worde (*eſpecially*) he ſeemeth little leſſe then to yeelde, that in other caſes not *capitall*; this oath is not againſt the *lawes*, nor *iuſtice of the land*. But it is very vntrue to thinke, that whatſoeuer is wholly forborne in Temporal courts, ſhould therfore (ſtraight way) be accounted to be againſt them. For there is great difference betwixt *not vſing*, or forbearing, and plaine *forbidding* of a thing to be done.

Furthermore, we are commanded in [1] *Scripture, to be ready to giue an account to euery one that asketh vs a reaſon, of the hope that is in vs, with meeknes and feare*. If to euery one, much more to a *Magiſtrate*. What then if he (hauing alſo authoritie to impoſe oathes) will exact it in this caſe? may he not as lawfully doe it, as without oath, he may aske and *interrogate* the partie? Nowe it is no more lawfull before God, for vs (being but asked of *our fayth, or hope*, euen by a priuate man) to dally with him, or to ſay vntruly, though it might ſaue our life: then wee may ſay vntruly, when wee be ſworne to tell the trueth thereof vnto a *Magiſtrate*. [2] *doe not gaine ſay the trueth in any caſe* (ſaith the wiſeman:) and againe, *be* [3] *aſhamed of vntrueth before a Magiſtrate; or a man in authoritie*. So that hereupon it may ſeeme, to be againſt *Gods lawe*; to ſet any man at libertie from anſwering truely, touching his *fayth* and *hope*; and ſo in *hereſie*: when, howe, and by whomſoeuer, he ſhalbe *interrogated*; yea though danger of

[1] 1. Pet. ca. 3. ver. 15.

[2] Eccleſiaſt. 4. ver. 30.

[3] Eccleſiaſt. 42. ver. 21.

death might enſue thereby vnto him.

His ſecond anſwere to that ſtatute, is, that, *if this oath be implyed vnder the worde of Canonicall ſanctions, mentioned in that ſtatute, then was it no binding law; nor gaue ſufficient authoritie, &c. becauſe all lawes of man, repugnant to the lawe of God, are meerely voyd.* Where he aſſumeth as graunted; that this oath is *repugnant to Gods law*, which ſhal (God willing) be prooued far otherwiſe.

The laſt point, which to this purpoſe he ſuppoſeth wil be obiected, is; that, *the kings heretofore haue graunted Commiſſions to examine by oath.* This, *he thinketh, cannot be prooued: and though it could; yet* (ſayth he) *ſuch Commiſſions are againſt law, and therefore voyde.* Therefore, vntill they be prooued to be herein *againſt lawe*, this anſwere will fall to nought; and the obiection will remaine till then good and ſound. And ſo I ende this tedious Chapter, made in anſwer of all that which I finde brought for proofe; that theſe oathes (whereof we argue) ſhould be *contrarie* or *repugnant*, vnto the *ſtatutes, common lawe, or cuſtomes* of this *Realme.*

CHAP. VIII.

That miniſtring of ſuch oathes, is by the Lawes of the Realme, allowed vnto Iudges of Eccleſiaſticall courts: and ſome fewe obiections made to the contrary, are anſwered.

THat the lawes of the *Realme* allowe it vnto courts *Eccleſiaſticall* (which point comes next to be declared) theſe few allegatiõs folowing, may ſuffice.

[1] 3.H.5.ca.1. [1] *Ordinaries are authorized, to enquire of the foundation, eſtate, and gouernance of Hoſpitals (being not of the Kings foundation) and of all other matters neceſſarie in that behalfe; and vpon that, to make correction and reformation:* howe? *after the lawes of holy Church, as to them belongeth.*

Now by thoſe lawes, *Enquirie*, touching *crimes* not *capitall*, is made by the *defendants oath:* as in the next Chapter folowing is declared. So that (if any ſuch faultes be) the perſons viſited are to diſcouer them, vpon their oathes: which cannot be entended, but that they may be *criminall* and *penall* to them ſelues: becauſe the ſtatute ſayth, that they are to be *corrected* and *reformed.*

[2] 1.H.7.ca.4. If [2] *Clerkes be conuicted before Ordinaries of incontinency, by examination, and by other lawfull proofe requiſite by the lawes of holy*

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Church, they may be committed to ward. But it is ſhewed afore, *that examination* (euen at the cõmon law, like as at the *Eccleſiaſticall*) *is vpon oath.* So that ſuch oath is (by the iudgment of that ſtatute) deemed a *lawfull proofe, requiſite by the lawes of holy Church.*

Executors & [1] *adminiſtrators muſt giue oath (before Ordinaries) of the trueth of ſuch Inuentaries, as they doe exhibite.* Yet this may implye in it, either *periurie*, or ſome *diſcouery* of a mans owne fault; if he haue dealt therein corruptly and fraudulently. [1] 21. H. 8. ca. 5.

And another [2] ſtatute (though ſtanding repealed) yet giueth good teſtimonie, that not onely *Enquirie* at an *Ordinaries* viſitation; but alſo, that the parties owne *examination*, of whome the *enquirie* criminall *ex officio* is made; is holden for a due courſe of the lawe *eccleſiaſticall*, not diſallowed of by the lawes of the Realme. And ſuch examination is done by oath, according both to that lawe, and to the *Temporall* in like behalfe; as hath bene ſhewed out of Iuſtice *Brookes abridgement.* [2] 27. H. 8. ca. 10.

Moreouer [3] *Ordinaries* are authorized to *enquire* & to *puniſh*, &c. the violation of the Act made for *vniformity of common prayer*: howe? euen, *as heretofore hath bene vſed in like caſes, by the Queenes eccleſiaſticall lawes.* But ſuch *enquirie generall* is preſcribed, and ſo was alwayes practiſed, by the *oathes* of men: and the *enquirie ſpeciall* is, and was vſed by the *defendants* owne *oath*, in caſe he ſhould ſtand in deniall. [3] 1. Eliz. ca. 2.

The oath of [4] *Supremacie* may be giuen *ex officio* (by any *Ordinarie*) to a *Clerke*, being within his iuriſdiction: yet if ſuch *Clerke* doe cary a contrary perſwaſion, it vrgeth him to reueale, and diſcouer himſelfe, and his *erroneous opinion*, by refuſall of the *oath*, or elſe to be foreſworne. which if he liſt not to be, but rather refuſe; then falleth he (thereby) into a *Præmunire*, which putteth him out of the *Queenes* protection, forfeiteth all his lands, &c. and condemneth him to perpetuall impriſonment. [4] 5. Eliz. ca. 1.

In a ſtatute made againſt [5] *periurie* the ſame time; this *proviſo* is cõteined: ỳ the *ſaid Act, nor any thing therein cõteined, ſhal not extend to any ſpiritual or eccleſiaſtical courts, or courts within the Realme of England or Wales, or the Marches of the ſame: but that al & euery ſuch offender and offenders, that ſhall offend in forme afore ſayd; ſhall, and may be puniſhed, by ſuch vſuall and ordinarie lawes, as heretofore hath bene, and yet is vſed and frequented, in the ſayd Eccleſiaſticall* [5] 5. Eliz. ca. 9.

courts: any thing in this preſent Acte to the contrary notwithſtanding. Where (I thinke) it will not be doubted, but that vnder that worde *puniſh*, is vnderſtood, the whole courſe alſo *vſed by thoſe lawes*, which muſt neeedes goe afore and doe tend to the *conuicting* of ſuch faults, as be (thereby) to be *puniſhed*. It was neuer claimed, nor vſed by any *Eccleſiaſticall* courts either afore or after; to puniſh any *periurie* or *ſubornation* of *periurie*; but either for breach of *oathes* voluntarily taken, called *læſio fidei* (in ſort as is ſhewed in the firſt part) or elſe for *periurie* or *ſubornation thereof* committed in an *Eccleſiaſticall* court, & matter. So that it can not be intended; but that this *ſtatute*, meaning to reſerue vnto courts *Eccleſiaſticall* if not more, yet at leaſt the *puniſhment* of all *falſe oaths* there made, did minde withal, rather to eſtabliſh then to preiudice oathes there appointed to be taken, *by ſuch vſuall and ordinarie lawes Eccleſiaſticall*. For if oathes (eſpecially in *criminall* cauſes) were neuer there to be taken: there could then be none at all, or at leaſt there would be much leſſe danger, of any *periurie* and breach of oath.

[1] 5. Eliz. ca. 23. In the [1] ſtatute *de excõmunicato capiẽdo*, ſundry grieuous crimes (being of *eccleſiaſticall* conuſance) are reckoned vp. thereby it is alſo prouided, that the *ſignificauit* frõ the *Ordinarie*, vpon any of them, muſt cõteine, that *the excõmunication proceeded vpon ſome cauſe or contempt of ſome originall matter of ſome of the ſaid crimes, there mentioned*. Now it is ſure, that after appearance yeelded; cõtempts moſt vſually are committed, by not performing ſomething that is cõmanded, according to that law. as by refuſing to ſweare; or being ſworne, to anſwere directly, as a man ought. So that this ſtatute leaueth the determination of all ſuch *contempts* to the diſpoſition of that law, by which the proceeding is made.

I haue touched (afore in the ſecond part) certaine caſes; where the *common law* not only alloweth, but alſo (in ſome ſort aboue the other courſe) doeth priuilege vnto courts *Eccleſiaſticall* the proceeding *ex officio*, againſt *crimes* puniſhable by that Iuriſdiction. As namely, that in proceeding againſt an offence, for *laying violent hands vpon a Clerke*; *Bryan* and *Littleton* helde (no man gainesaying it) that *the* [2] *ſpiritnall court may puniſh it ex officio, but not at the ſute of the partie, leaſt the beater be thereby kept from his abſolution, till ſome temporall duetie, be contented and payde.*

[2] M. 10. Ed. 4. 10.

And

And[1] *Mordant* was of opinion; that *if a man be ſued by a party pro laſione fidei, in not paying a ſumme of money promiſed; there ſhall be a prohibition: yet if the Iudge eccleſiaſticall ſhall doe it ex officio, that then no prohibition ſhal lie.* And a iudgement giuen long afore in the booke of[2] *Aſſiſes*, ſeemeth to accorde herewith, and to ſtrengthen this opinion.

[1] T. 12. H. 7. fol. 22.

[2] Lib. 22. Aſſiſ. fol. 70.

Fitzherbert in his *Noua natura brevium*, reporteth the Lawe to be: that *an*[3] *Ordinary may cite, & proceede againſt a man ex officio, pro violenta manuum iniectione in clericum.* Likewiſe *for tithes deteined in the time of the vacation of a Benefice:* ſo alſo *hee may cite thoſe, who refuſe to mayntaine a Curate or Chapleine, and for fornication and like offences.*

[3] Nou. nat. brev. tit. conſultation, fo. 50. & deinceps.

But by the law *eccleſiaſticall*, according to which the proceeding is, the courſe of proceeding againſt crimes and offences (for the moſt part) is by the parties *corporall oathe* vnto *articles* or *poſitions* of the very crime it ſelfe, ſo there be precedent, a *denunciation, a fame, notoriouſnes of the facte, taking in the maner*, or anie other matter, ſufficient in law, to open a way to ſuch *Enquirie*.

That *enquirie* is allowed by common law vnto Courts *eccleſiaſticall* (and ſo conſequently theſe *oaths*) appeareth alſo further, by two precedents of *conſultations*, ſet down in the *Regiſter*. The[4] former of them mentioneth & alloweth of an *Inquiſition* made by the *Deane of Yorkes* Officiall, and of his proceeding thereupon, for defects in a *Chancell*, and for want of ſundrie ornamēts, and other requiſites in a Church.

[4] Regiſter tit. Conſultat. fol. 48. a.

The[5] other (beſide a *conſultation*) doth conteine alſo a cōmandement to the *Ordinarie*, to take full information, euen by way of *Inquiſition*, and by other meanes, touching the value of tithes, and to certifie into the *Chancerie*. Now al *Enquirie* generally (as is ſhewed afore) is *ex officio*; and is by *oathes* of other men in *generall enquirie*; and *in proceſſu informatiuo*: and may be by the *oath* of the defendant, *in proceſſu punitiuo*, ſo the crime be not *capitall, or of mutilation of limme*.

[5] Ibid. fol. 54. b.

But to ſpeake more particularly for proceeding of *Office*; we finde there, that an[6] *Ordinarie* proceeded *ex officio*, as for a *crime*; againſt a pariſhioner for tithes deteined by him, whiles a benefice was vacant.

[6] Ibid. fol. 51. b.

That it is[7] allowed vnto them to proceede againſt crimes, *ad*

[7] Ibid. fol. 49. a.

correctionem animæ, we haue a precedent there, of an Ordinaries proceeding against a lay man for *vsurie*, euen at the *instance* of a *partie* grieued.

That against *crimes*, *defects*, and *excesses*, they may proceede & obiect *articles ex officio*; [1] appeareth by the precedēt there set downe; where an *Ordinarie* proceeded *ex officio*, to the *interdicting* of a church; by reason a part of *diuine seruice* (as it was then holden) founded to be vsed in that Church, was withdrawen.

[1] Ibid. fo. 51. b.

Where an [2] *Ordinarie* proceeded *ex officij sui debito*, to the correcting of crimes and excesses of those, that were vnder his Iurisdiction: and among others, obiected *articles* against a *Knight*, for not sufficient reparations of a Church, tending to the correction of his soule, by reason of his deteining of that which hee ought not: this is there allowed, to belong to the court *Ecclesiasticall*, and to the liberties of the Church.

[2] Ibid. fo. 43. b.

Likewise we find there, an [3] *Ordinaries* dealing allowed; who proceeded *ex officio* against one, that had laied *violent hands vpon a Clearke*, so farre foorth as he dealt but for *correction* of the delinquent, to the *excommunication* of him, & punishment of his *sinne*, without adiudging any amends to the *partie* wronged: for this belongeth to a *Temporall Court*.

[3] Ibid. fo. 51. a.

[4] Vpon a publike *fame* arisen, that a certaine parishioner did withhold his due *oblations*, refused to be *confessed* to the priest, & to receiue the *communiō* at least once a yere: the *Ordinary ex officio* did call him, to the intent to inflict some *corporall* paine vpon him, for correction of his soule: and this proceeding is there allowed vnto *Ordinaries*, to be of their *iurisdiction*, and lawfull.

[4] Vpon a publike *fame* arisen, that a certaine parishioner did withhold his due *oblations*, refused to be *confessed* to the priest, & to receiue the *communiō* at least once a yere: the *Ordinary ex officio* did call him, to the intent to inflict some *corporall* paine vpon him, for correction of his soule: and this proceeding is there allowed vnto *Ordinaries*, to be of their *iurisdiction*, and lawfull.

[4] Ibid. fo. 50. a. & b.

One [5] *Lindsey* a *publike Notary*, being infamed as wel of a *crime of fornication* (for so I take it, that it ought to be read) by him *cōmitted*; as for *contēpts* done to that court: was *ex officio* proceeded against, by ỹ *Deane of the Arches*, for correctiō of his soule & maners, both which are there allowed (together with such proceeding) to belong to ỹ *libertie* of the *church*, & to *eccles. iurisdiction*.

[5] Ibid. 54. b. & 55. a.

In which copie of *consultation* it is to be noted, that towards the end therof, & also in the title of it in the margent; this word *defamationis*, is vsed in steed of the word *fornicationis*: for actions of *defamatiō* be seldom, or neuer sued *ex officio*, but at the *instance* of some *partie* grieued. Besides mention is there made of *committing*

it within that *iuriſdiction*; which, in *defamation* (that is not properly ſaid to be *committed*) is not material, ſo the defendant remaine then in that iuriſdiction. and therefore, where in the beginning of that *Writ*, the wordes are printed, *Super formationis, &c.* and *conuerſo* (which hath no ſence nor yet is any *Latin*) no doubt it ought to be *ſuper crimine fornicationis &c. commiſſo.*

As for the [1] *crime* of *fornication*, it is twiſe (beſides) noted by the *Regiſter*, that *Ordinaries* proceeded againſt it, in that forme. In the firſt wherof it is ſaid, that the *Ordinary*, proceeded *ex officij debito* (as bound by his office & duty) againſt a *chapleine* that kept a cõcubine publikely to the danger of his owne ſoule, & with *ſcandall* of others. Therefore this crime was obiected againſt him *ex officio*, for his correction, and for reformation of his maners. [1] Ibid. fol. 45. a.

In the [2] later of them, the *Official* of *Canterb.* proceeded *ex officio* againſt a *vicar* (for the ſame *crime*, & for *contẽpts* alſo by him made againſt that court) *ad correctionẽ animæ ſuæ.* And there it is ſaid of both the faults, as in al the former *cõſultatiõs* to like effect: that this is *cognitio ſpiritualis quæ ad forũ Eccleſiaſticum pertinet, in præmiſſis.* And the ſaid *writ* runneth thus: *Cùm vos nuper ex officio veſtro, fama publica referente, quod T. &c. veſtræ iuriſdictionis C. in amplexibus fornicarijs tenet: ipſum coràm vobis in curia chriſtianitatis pro correctione animæ ſuæ, in hac parte citari feceritis, procedentes contra eum (ibidem) iuxta canonicas ſanctiones &c. vobis ſignificamus, quod in cauſis prædictis ex officio veſtro, quatenus ad correctionem ipſius vicarij, & non concernunt placita de catallis & debitis, in curia Chriſtianitatis procedere, & vlterius ibidem pro ſalute animæ ſuæ ſtatuere & facere poteritis, quod ad officium veſtrum ſpeciale noueritis de iure pertinere, prohibitione noſtra prædicta non obſtante.* [2] Ibid. fol. 57. b.

So that by theſe ſo many *precedẽts* of *conſultations*, by *citations*, & proceeding againſt *crimes &c.* (being of that iuriſdiction) by way of *inquiſition* or *enquiry*, & by ỳ authoriſing of *eccleſiaſticall* iudges in al of thẽ, to proceed therein, & to do, *quod ad forum eccleſiaſticũ nouerint pertinere:* & by the obiecting of the *crimes* to the parties *enquired* of, *ex officio iuxta canonicas ſanctiones, ius, & libertatẽ eccl.* (which may be by *oath*, in matters aſwell *prohibita quia mala*, as *mala quia prohibita*) & againſt *lay*, aſwell as *eccleſiaſticall* perſons; we do conclude, & gather; that by ſo many iudgemẽts of the *cõmon law* for crimes of *eccleſiaſticall* coniſance (and conſequently in matters neither *Teſtamentarie*, nor *Matrimonial*) any perſons, whether

whether *lay* or *eccleſiaſticall*, being vnder that *iuriſdiction*, may be *cited*, (though againſt their wils) by *Ordinaries* & *Iudges Eccleſiaſticall ex officio ipſorum mero*. And vpon apparance, may by *cenſures eccleſiaſtical &c.* be vrged vpō their oaths vnto examinatiō; & to anſwer matter, though it concerne their owne crimes. And therfore, that the lawes of this land do warrāt & alow, the miniſtring of that *othe* (wherof we intreat) vnto Courts *eccleſiaſticall*.

We do onely ſay, that the defendant may lawfully be vrged, in due proceeding *of office* to anſwere concerning ſome *crimes* of his owne, by vertue of his oathe. But according to the *Treatiſour*, *Note-gatherer*, and others, who ſeeme to confound all proceeding *ex officio*; with the very miniſtring of an *oathe* to a defendant, touching a *crime* obiected againſt him; we might a great deale more peremptorily conclude; that if theſe two (as they holde) be but (in trueth) all one thing, then whereſoeuer proceeding *of office* is, there ſuch *oathe* (of neceſſitie) muſt be alſo miniſtred and taken.

Theſe proofes (laſt alleadged) are gathered out of Writtes of *Conſultation*, after that (by the parties conuented) *Prohibitions* had beene brought, to remooue the cauſes from *eccleſiaſticall* Courts. And therefore no doubt, but that the Lawe (before the *Conſultations* awarded) was thoroughly debated; and that the *parties delinquent* were *cited*, and proceeded with altogether againſt their willes. For, can any be ſo ſimple, as once to imagine, that a man who is *cited* to anſwere, in a cauſe *criminall*, and to be puniſhed or corrected for it, will willingly appeare and anſwere; if hee neede not to come at all, and were therein alſo, by Lawe protected? Or that he wil be at coſt, to procure a *prohibitiō* to ſtay the dealing; where he is willing enough to be proceeded with?

But beſides allowance hereof, by the *Statutes* and *Common Lawe* vnto Courtes *eccleſiaſticall*; the *practiſe* alſo by time immemoriall hath runne accordingly; as may poſitiuely appeare by *Acts* of *Eccleſiaſticall* Courts, and (by way of *abnegation*) may be ſhewed from the *Recordes* at the common Lawe. In that (as I thinke) it will not in them be found; that any *Prohibition* (hath vpon this point onely) beene awarded thence: or at leaſt, vpon debate for obtaining of a *Conſultation*, ſuch hath not ſtoode, nor beene mainteined.

And

And albeit, either vpon this conſideration, or ſome other as weake, certaine euill diſpoſed and factious perſons; haue long agone diſputed and maintained opinion, againſt oathes miniſtred both in Courtes *temporall* and *Eccleſiaſticall*; yet vpon generall miſlike of ſuch *fond opinions* (as may be gathered) a *Prouinciall conſtitution* was then agreed vpon and concluded; to make euen all diſputations, againſt *oathes*, miniſtred in either court, to be *hereſie*, which *Conſtitution* I haue not hitherto found to haue bene miſliked, much leſſe condemned at any time ſince; as contrary to any the lawes or policie of this land. *Let*[1] *no man* (ſaith that *Conſtitution*) *preſume to diſpute &c. againſt othes which are made either in Eccleſiaſticall or temporall Courtes in caſes accuſtomed, and in vſuall manner, &c. and from henceforth, let it be commonly taught and preached; that oathes may lawfully be taken by all (to whom it appertaineth) by touching the holie Goſpels, and vpon them; in all caſes by law expreſſed, and which are vſual in both courts.* Seeing then it is moſt apparant, that the *oathes* (which wee here diſpute of) are both expreſſed and preſcribed by lawes *Ciuil* and *Eccleſiaſticall*; and were alſo there vſed, both at the very time of ſuch *Conſtitution*, and long afore: it wil hereupon follow, that the like oaths were then alſo vſed in *temporall* Courts, and were (by that *Conſtitution*) aſwel alowed vnto *Eccleſiaſticall* courts, as they were in their owne *temporall* courts. Which thing is ſo much the more manifeſt, in that, a little *Treatiſe* purpoſely compiled (I take it) by *Saint German* in the time of king *Hen. 8.* euen againſt ſundry ſuch *Conſtitutions*, both *Legatine* and *Prouinciall*; yet ſaith thus of this very point, viz.[2] *though ſuch a mans ſaying viz. againſt vſuall othes, in both courts be vntrue; yet it is none hereſie.* He yeeldeth then, that, in all caſes then accuſtomed in both courts; othes might lawfully, and alſo ought to be taken.

[1] Conſtit prou. de hæreticis, &c. nullus.

[2] A Treatiſe concerning Conſtit. *Prouinciall* and Legatine. ca. 23. printed by Tho. Godfrey.

The practiſe of this oathe (as in all former times) ſo was it alſo receiued and vſed, in the time of king *Henry* the eight, as well after the *Papacie* was ouerthrowne heere, as afore: and ſo hath it continued euer ſince.

And after his time, the[3] *Lords of the Counſell*, finding *Bonner thē B. of London*, ſomthing ſlack in his duty; did enioine him to cal afore him al *refuſers* to come to diuine ſeruice, & to *ſearch out, conuent*, & puniſh al *adulterers*, according to the *eccleſiaſticall* lawes.

[3] Actes and Mon. 2. edit. 2. tom. fol. 1495.

[1] Ibid. fol. 1501. The[1] kings commissioners visiting the Church of *Paules* did examine al thē of that church by vertue of their oathe; touching their *doctrine* and *conuersation of life*. Wherevpon one *Iohn Painter* and others, did confesse *aduiterie* euen by themselues to haue bene committed. yet this was a *generall enquirie*.

[2] Ibid. fol. 1512. The *Kings*[2] *commission* to proceed against *Bonner*, affirmeth; that *the commissioners shal proceed, aswel by meere office: as also by way of denūciation, & by either of thē, or by any other meanes, by their discretions*. By vertue[3] wherof, they charged him w a *corporal oath, ex officio*; in form of law, to answer the *positiōs*, that should be ministred:

[3] Ibid. fol. 1512.

[4] Ibid. fol. 1516. which vpon his *oath* takē, were after ministred vnto him. But[4] for that he would not answer them fully, he was pronounced *contumax & pro confesso*, & was remaunded backe to prison as afore.

[5] Ibid. fol. 1536. The[5] proceedings about that time also, against *Ste. Gardiner*, & the oath ministred to him, was *ex officio*, in matters *criminal* & penall: as appeareth by the sentence of *deprivation* from his *Bishopricke* of *Winchester*. And yet besides *Bishops*, there were some of the *Kings counsell*, some *Ciuilians*, and also some *Iudges* of the land, and other common lawyers, who were then *commissioners* in that cause: and knewe the lawes as sufficiently well; as any doth, which now impugneth this course.

[6] Circa 3. aut 4. regni dominæ Elizabethæ reginæ. In her[6] *Maiesties* time that now is, a special *cōmission* was directed forth by her *highnes* vnto certaine great persons both *ecclesiastical*, & *lay*; wherof diuers were of the *priuy counsel*, to proceed, by way of *enquiry ex officio*, against 2. great & *honorable* personages, in a cause of correction for *incontinency*, for so the *commission* did runne. Whereupon they were accordingly called, and proceeded with; and were put to answer the *criminal* articles, vpon their *corporal oaths*.

Not onely at all general *visitations* holden in the beginning of her *Maiesties* reigne, by special *commissions*, grounded vpon the stat. *1. El. c. 1.* but also euer since, by vertue of the *commissiōs ecclesiastical*; this course of exacting such *oaths*, hath bin practised and continued. was it then so long together, against *papists* and other *delinquēts*, a most iust, & necessary oath, & such as against which, no good subiect (bearing the name of a *professor of the gospel*) euer did open his mouth in any dislike: and is it now become on a sodain, a *bloody, cruel*, vniust, & more then *Spanish Inquisition*; because a few

a few vaine, & *factious Reformatiſts*, are vrged with the ſelfe ſame maner of oath? Belike lawes themſelues are but partial, which in reſpect of *acception* of ſome mens *perſons*, doe ſo quickely turne their nature, from ſweete to ſower, and from iuſt to vniuſt?

When *D. Grindal late Archb. of Canterb.* was *B.* of *London*; he cõplained to the *Lords* & others of her *Ma.* moſt honorable *priuy cõſel*; for that by vertue of the *cõmiſſion eccleſiaſtical*, he could not ſo duly & thorowly proceed, to the *diſcouery* & *puniſhment* of certaine *knights*, & other great poſſeſſioners being *Recuſants* (as he ought) becauſe ſom *Ciuilians* & *common lawyers* (ſuppoſed thẽ by him to be like affected) did ſiniſterly animate and aduiſe them not to take oath, to anſwer vnto any *articles* obiected *ex officio*; vnleſſe ſome *fame* by *preſentment*, or ſuch like, were firſt found againſt thẽ, which would proue (ſaid the *B.*) a long, troubleſome, and chargeable courſe, if it ſhould be purſued; ſeing ſome of thẽ dwelt in remote places of the Realme, where as the people alſo ſtood like affected; ſo that they would neuer be induced, to make any ſuch *preſentment* or diſcouery. and yet that the matter was by *denunciations*, by vehement *preſumptions*, and by good *euidence* giuen vnto the *commiſſioners*; ſufficiently otherwiſe detected; or was ſo *notorious*, as that (by lawe) they might ground an *Enquiry of office*, againſt thẽ; as by others, no leſſe ſound Lawyers, he was informed. For redreſſe whereof, and for furtherance of Iuſtice, it pleaſed their *honorable LL.* to cal ſom both of the *Ciuilians*, & *cõmon lawyers* afore thẽ; to the Counſel boord, that had giuen ſuch aduiſe. & thereupon, three of the *doctors*, and one *counſellor* at law, were by thẽ cõmitted to the *Fleet*. which (I think) ſome of their *honorable LL.* & others yet remaining, can & do wel remember.

By al which here premiſed it doth appeare, how ſufficiently & manifoldly our intention (in this behalf) is grounded: & likewiſe to how ſmal purpoſe the *Treatiſor* reſoneth, where he gathereth; *that eccleſiaſt. courts muſt be reſtrained by the Q. prerogatiue roial, & common lawes, in that their iuriſdiction is from the Crown.* Conſidering, none of the defenders of this oath wil deny, either the *antecedent*, or *conſequence* hereof. But that which couertly he would thẽce inferre, viz. *that therfore they may not giue oths, but as the cõmon law doth*; wil not any way follow thereupon: becauſe the *Q. prerogatiue royall*, and *common lawes*, are ſo farre from reſtraining

or forbidding theſe oathes; that (as it hath beene prooued) they allow them. and the *Temporall Courts* (in many like caſes) vſe not ſo much as a different courſe from this; which is in ſpeciall controuerſie.

Now if it ſhall be ſaid, which alſo ſome very learned men do hold (as the *Treatiſour* confeſſeth) that the Statute law made the firſt of her *Maieſtie*, warranteth, and alloweth this manner of *oathe*: then to ſhew this to be (as he conceiueth it) abſurde; hee telleth vs of ſome other points alſo defended (vpon the generall words of that *Acte*, and of the *Commiſſion*) by the ſaide *learned men*; which ſeeme vnto him to be alſo no leſſe abſurdities, then is the miniſtring an oath in a cauſe *criminall*; & therfore the one no better warranted thereby, then the other. for to what other purpoſe then this, he ſhould bring them, I cānot poſſibly cōiecture.

The firſt fault he findeth with ſuch *learned mens* ſayings, is: for that they iudge it to be warranted by *the Act, and by the Cōmiſſion to put men to othes; none accuſation, ſute, or lawful informatiō, preſentment, or indictment, iudicially preceeding, or depending*. He may father vpon ſuch *learned men* what he pleaſe: but is it likely that he himſelf would thus obiect; as if he required bils of *Information* & Inditements (as it is at the *cōmon law*) to be vſed alſo in *courts eccleſiaſtical*, ſeing both himſelfe, and the *Note-gatherer* do tie the Commiſſion to cauſes only *eccleſiaſtical*, and they alſo to be dealt in, only *eccleſiaſtically*? Such learned mēs ſayings, may wel & truly be defended: as namely, whē either the offence is *notorious*, or is knowen to the *Iudges* themſelues, to be dangerous & *ſcandalous* to be ſuffered. For theſe two caſes be out of all thoſe that hee nameth: yea though he ſhould (moſt vniuerſally) take *ſuite* for any proſecution by another, and *information* for any priuate credible *ſuggeſtion*, or *denunciation* made.

The ſecond errour which he aſſigneth to be holden by them: is, for that, *ſecret information may be admitted, ſuppreſſo nomine notificantis*: and he calleth ſuch *informations, ſecret accuſations*, and the men *malicious calumniators*: adding, that *all good lawes, and well gouerned common wealths, haue ſuch hidden backbyters, for apparant accuſers*. But if *all good Lawes and well gouerned commonweales do (indeed) hold ſuch men for apparant accuſers*; then doth it follow; that, when ſuch *Information* is giuen, there is no want of

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an *apparant accuſation*. Yet in very deede, euery *relation* made to a *Magiſtrate* by ſuch, as will not proſecute, nor (perhaps) bee ſeene in the cauſe, for ſome good conſideration; is not by any *law*, nor in any *common weale* that I know of; holden for an *accuſation*, for a *malitious calumniation*, or for any *ſecret backbiting*, nor yet deſeruedly (by any neceſſitie) is ſo to bee accounted. For beſides other countreys which I haue read of; ſuch priuate informations haue (oftentimes) their manifolde good vſe, euen in this *Realme*, yea and amongs ech degree of *Magiſtrates*. And if they ſhould be [1] wholy reiected, or neglected; might (ſometime) bring an whole ſubuerſion vnto vs all.

[1] Vide 2. part. pag. 85.

I pray, were thoſe that gaue the firſt *information* of *Babingtons* damnable conſpiracie, to be miſliked, as *ſecret backbiters*? or was the *examination* of theſe traitors, and the proceedings vniuſt; becauſe the names of the intelligence-giuers, were to this day ſuppreſſed? By this example then you may wey, & conſider, of ſundry the like. Howbeit ſuch *informations* in *ordinarie* courtes *Eccleſiaſticall*, be not holden for ſufficient ground of *Speciall Enquirie*; except they be very frequent, and the offence *ſcandalous*: and in *Commiſſion courtes*, they bee as rarely receiued, as in any courts *Temporall* of this Realme whatſoeuer, and then but from very great, and credible perſons.

The third fault he findeth with ſuch *learned mens* opinions, is; that, *the Iudge may profeſſe himſelfe to be an Accuſer: which lawleſſe proceeding, the Iuſtice of this land* (he ſaith) *deteſteth*: for that *no man may be accuſer, and witnes*: or *Inditour*, and a *Iurour*: *therefore much leſſe may the Iudge be an Accuſer*. For anſwere whereof, firſt the lawes *ciuill* and *eccleſiaſticall*, holde not the *Iudge* proceeding *of office* to be any *accuſer*: but that whereupon the *Enquiry* is grounded, to repreſent the *accuſation*. and ſo there is no need for them to pleade ſuch plea, as he here ſurmiſeth. Secondly, that, *an accuſer* may (in ſome caſe and ſort) be a witnes, &c. is [2] elſewhere declared: and ſo his *antecedent* falſe. Thirdly, his reaſon foloweth not: for why might not a *Iudge* be an *accuſer*: albeit neither an *accuſer* could be a *witneſſe*, nor the *Inditour* a *Iurour*? Fourthly, if it were true, that the *Iuſtice of this land*, and the *common lawe* did not vſe ſomething, which an *Eccleſiaſticall* court doeth: may it thereupon bee inferred, that therein is a *con-*

[2] Vide 2. part. pag. 110. & 111.

contrarietie, and thereby (for ſuch *difference* onely) a deteſtation of the other courſe? This maner of reaſoning is more cõmon with him & others, in theſe cauſes; then any way ſound & ſubſtantial. For the one court *doeth it*, & the other *doeth it not*, be no *contraries*; nor yet *propoſitions* in any other degree of *oppoſition*: in that, *ſubiectum propoſitionis* in both, is not the ſame, and therefore doe import no more, but a *diuerſity*. For is this (which is the very like) any good reaſon, viz. an *Eccleſiaſticall* court readeth *diffinitiue* ſentences *de ſcripto*, but a *Temporall* court doeth it not, in giuing iudgement, therefore there is *contrarietie* betwixt theſe courts? & ſo the reading *de ſcripto*, in a court *eccleſiaſtical* vtterly vnlawfull? Whereof I thought it not amiſſe, once for all to aduertiſe the Reader, becauſe this erroneous argument is ſo vſuall.

Laſtly, if all theſe were to be graunted vnto the *Treatiſour*, euen as he ſetteth them down; yet what would it auaile his cauſe? For admit theſe collections were *abſurdly* gathered, from the generality of the words of the *Act* & *Commiſſion*; would it therefore follow, that authority, to miniſter oaths to defendãts *in cauſes criminal*, could not thence be argued without abſurdities, being wholly another point? why? if euery thing cannot well be inferred thereon, may therefore nothing at all be? Yet vpon theſe & ſuch like *ſpeeches*, rather thẽ *reaſons* of his, (elſewhere by ſundry occaſions touched) the *Treatiſour* wiſheth; *the ſaid learned men wiſelier to aduiſe theſe Cõmiſſioners eccleſiaſtical, to reſpect the ends expreſſed in the ſtatute, viz. the pleaſure of God, increaſe of vertue, conſeruation of peace and vnitie of this Realme: rather then the ample and large words of the ſtatute, and height of their Iuriſdiction.* as if theſe ends, could not poſſibly concurre, with tender of ſuch oaths. But whẽſoeuer, he, or any other learned or vnlearned, haue ſufficiently (indeed) prooued, that theſe cannot ſtand together; I doubt not, but that the *Cõmiſſioners*, wil take it, as a great benefit, to haue bin inſtructed by thẽ in a point touching *the pleaſure of God, increaſe of vertue, & conſeruation of vnitie*; which by moſt of their large trauels in *Diuinitie*, by themſelues they haue not hitherto foũd. Howbeit, this laſt part of his ſaying ſeemeth vnto me to ſound; as if he would not ſtick any more, to grant vnto vs, that *the large words of the Act* doe allow of this oath. So that we finde nothing any way materiall by him alleaged, to impeach our former *con-*

cluſion

cluſion, viz. that *the common lawes*, and *ſtatutes* of this Realme, allowe ſuch oaths to be tendered by *Eccleſiaſticall* Iudges. & therfore the oath of the partie in ſome matter of crime, that may be *dãmageable* & *penal* vnto him; is both in practiſe, & is alowed alſo to be practiſed (in courts *eccleſiaſtical*) by ẏ lawes of this realme.

CHAP. IX.

That ſuch oath touching a mans owne crime is allowed, both by the Canon *and* Ciuill *lawes: howe farre, and in what ſort: and that the like is eſtabliſhed, and thought equall, by the lawes & cuſtomes of ſundry other nations, aſwell ancient, as moderne.*

SEeing then the giuing of an *oath* in a cauſe *criminall*, & penall to a mans owne ſelfe; is practiſed by the lawes of the *Realme*, and allowed by them, vnto courts *Eccleſiaſticall*: in both which reſpects, ſuch *Canons*, as preſcribe it, are by *ſtatute* warranted to be ſtill vſed, as they were before the making of the Act. 25. H. 8. and in trueth haue bene alwayes ſince: let vs therefore ſee; whether this courſe be iuſtifiable alſo by *Canon* and *Ciuill* lawes, and by them allowed and practiſed.

Firſt, the *lawes* of the realme, that do allow certaine matters to be of *eccleſiaſticall* conuſance, cãnot be intended, but to allow an *eccleſiaſtical* forme of proceeding, by ſuch lawes receiued. For it were as vnreaſonable to barre them from proceeding in a cauſe *eccleſiaſticall*, according to that lawe: as it would be to require of them to deale, by way of *Inditements* and *Iuries*. Thoſe lawes are ſo plentifull in this point, that it were vaine to ſet downe but a tenth part of that, which in this behalfe, might be ſayd. Therefore I holde it beſt to ſhewe vnto you, what is the lawe herein (agreeable alſo to the practiſe in *ordinarie* courts *eccleſiaſticall*) as I conceiue it; in as great briefnes, as I can. which may both declare, that by thoſe lawes it is allowed, how farre, and why it is lawfull: & may alſo ſerue to anſwere (by true diſtinction) vnto all *obiections*, drawen out of either of thoſe lawes, againſt this courſe.

An *oath* touching a *criminall poſition*, or *matter*, is either taken by

by a *witnes*, or by a *partie*. A witnes (by the very nature of teſtimonie) muſt depoſe indifferently, alwell for the partie againſt whom he is produced, as for him, which produceth him. And therefore is to anſwere truely, not onely to the *poſitions* and *articles*, giuen in by him, by whom he is produced: but alſo, vnto the lawfull and pertinent *Interrogatories*, miniſtred euen by the aduerſe part. In which *Interrogatories*, two ſeuerall ſortes of matters may be conteined; tending to diſable him, from giuing teſtimonie. The firſt is an *Interrogatorie* tending to the diſcouerie of his owne turpitude: and *vnto* [1] *this, whether it concerne any crime ſuppoſed to be committed by the witnes, or his confeſſion thereof, or the fame and infamie againſt him of ſuch crime; or a ſentence thereof, or an excommunication* (thereupon) *gone out againſt him, or any ſuch like matter; he is not bound to anſwer vpon his oath*, though he haue done penance for it, and thereby be preſumed, to be reformed. The reaſon hereof, is truely alleaged to be this; [2] *becauſe the end of ſuch a criminous Interrogatory, miniſtred by way of exception or barre to a witnes, or to an accuſer, is onely to diſable him, from accuſing, or witneſſing, & not to the acquitall or condemnation of the perſon ſo challenged of the crime; as the ende is, where a Purgation of a mans owne ſelfe, is to be enioyned:* & therefore, no reaſon to aske it of himſelfe. For (as one wel ſaith) *by the* [3] *order of charitie, eche man is bound, to loue his owne body, and fame, one degree ſooner and neerer, then his neighbours*: inſomuch, as the *loue* towards our ſelues, is made the *rule*, howe to *loue our neighbours*; in which reſpect it is ſayd, that, *ordinaria charitas incipit a ſeipſa.* and therefore *no man is bound to furniſh one that ſtandeth & oppoſeth himſelfe againſt him; euen againſt himſelfe, in matter of crimes. but* (ſayth he) *it is otherwiſe, when a man is vrged to the like, by a Magiſtrate, that is his competent Iudge.* Whereby the reaſon of the [4] priuilege of an *oath* miniſtred *ex officio*; aboue that, which is at the *inſtance* of a *partie*, appeareth.

1 Felinus in ca. cum caulam, de teſtibus. nu. 10. per communem opinionem.

2 Io. Andr. in ca. 2. de confeſſis. nu. 6. per c. ex tuarum. de purgat. Canon. &c.

3 Alph. Villag. in Pract. Can. li. 3. a. 13. conclu. 3.

4 Vide 2. Part. pag. 36.

The ſecond ſort of *Interrogatories; tending to the diſabling of a witnes, is ſuch, as conteine no turpitude in themſelues. as* [5] *Interrogatories, touching his condition, as whether he be bond or free, or of his ponertie, kindred, or aliance, and ſuch like, and to theſe, he is bound to anſwere.*

5 Felin. ibid. per Baldum.

When a *criminall* matter is obiected, as to be anſwered by him

him that is *partie* vnto the ſuite: it either toucheth the *crime* of ſome *witneſſe* by him produced, or elſe the *partie* his owne crime: *if*[1] *it toucheth a crime of his owne witneſſe, he muſt anſwere it by the vertue of that part of Iuramentum calumniæ, by him taken; which is, that he ſhal not burthen (more then needs) his aduerſary, in making his proofes; but ſhall himſelfe confeſſe a trueth therein, when he is asked.*

[1] Specul. de teſte. § iam. de interrogat.

But when it toucheth the *parties* owne *crime*, it is of two diuers conſiderations: for either, the cauſe is *Ciuilly* mooued for the *priuate intereſt* of the proſecutor: or els *criminally*, for *publike puniſhment*.

If the ſuite be but *ciuilly* mooued, the *criminous poſition or interrogatorie*, may concerne ſuch a crime; as being concealed, brings benefit, & commoditie to him, with another mans loſſe. And in[2] this caſe (albeit there be no *fame*, or no *detection* precedent) the *partie* is bound to anſwere it vpon his oath.

[2] Bartol. in l. Manellus. §. qui rerum. nu. 30. ff. rerum amotarum.

But if the concealing of it, cannot procure his gaine, with another mans loſſe; [3]then is not the *partie* himſelfe (in ſuch caſe) bound to anſwere a *poſition criminous* ſo mooued by his *oath*. yet euen in this [4]caſe, if ſuch crime bee *notorious*, or be otherwiſe ſufficiently diſcouered by *fame* &c, then is he bound to anſwere it, vpon his oath.

[3] L. qui iuraſſe. §. qui pater. ff. de iureiur. & ibi glo. l. ſi a te. ff. de excep. rei iudic.
[4] Bartol. vbi ſupra remiſſiue.

Nowe if it bee mooued *criminally*, to the intent of *publike puniſhment*; it is either touching a crime altogether hidden, or a crime which (in ſome ſorte) is bruted abroade and *manifeſted*. if it be ſimply *hidden*, and *ſecrete*, the [5] rule is; that a man is not bound to anſwere ſuch crime, vpon his *oath*: *quia nemo tenetur, propriam turpitudinem reuelare*.

[5] L. qui iuraſſe. §. ſi pater. d. c. inquiſitionis ex. de accuſat. c. dudum. el. 2. de electione gl. & Innoc. ibi Specul. tit. de Poſitionibus. §. 7. nu. 40. & eſt communis regula ſecundum Decium. l. fin. C. de edendo. c. qualiter. el. 7. de accuſat. c. ſi peccauerit. 2. q. 1.

And it is [6]alledged out of *Chryſoſtome* in the *Decrees*: *Non tibi dico vt te prodas in publicum, &c.*

[6] De pœnitentia, diſt. 1. c. quis aliquando. ibi. non tibi dico.

One reaſon hereof is; [7] becauſe *meere ſecrete ſinnes* neede not be publiſhed, but are to be left vnto God alone: *De occultis Eccleſia non iudicat*.

[7] Arg. 6. q. 1. c. ſi omnia.

And another *Canon* to like effect, [8] ſayeth thus: *We ſpeake of ſinnes manifeſted: but as for meere ſecretes, God (alone) is hee, that knoweth them, and will iudge them:* where, by *ſecrete ſinnes*, hee vnderſtandeth ſuch; as are by none *inckling* and *probabilitie* brought vnto light, and therefore cannot poſſibly be *denounced* in any particularitie, vnto the *Iudge*.

[8] Vrbanus 2. c. erubeſcant. diſt. 32.

Therefore in *generall Enquiries* (as at visitations) the lawe prescribeth this forme of oath to be taken by them, who are to [1] *denounce* and present, viz. *touching such matters as they knowe, or beleeue*, & haue in charge (*excepting alwayes crimes meerely hidden*) *they shall say the full truth, and nothing but the trueth*. In which respect, it is said, that *if* [2] *an Officer of a Towne* (as such, which be called in *Italie Decani villarum*) *by prescript of some statute, be to denounce al misdemeanors committed in that towne, vpon a grieuous punishment otherwise to bee inflicted vpon him: yet is hee not thereby bound, to present any secrete offence committed by himselfe*. Neuertheless, I haue heard it in the forme of the oath (giuen to grand *Iuries* at *Assises* and *Sessions*) conteined: that they should *enquire* of their owne, their fellowes, and other mens misdemeanors, which they should haue in charge.

[1] c. qualiter. el. 1. de accusat.

[2] Salicet. in l. ea quidem. 17. q. 1. de accusat.

A great learned [3] *Schooleman* (by distinction) doth thus determine of this poynt: *If the Adulterie be altogether secret, a man is not bound iudicially to confesse his sinne: neither in this case, ought an oath of telling the trueth, to bee exacted of him: because hidden faults are reserued to Gods owne iudgement, according to the 1. Cor. 4. Chap. But when an euill fame runneth of adulterie committed, or when there appeare some euident tokens, which may induce great suspition thereof: or else when it is proued Semiplene, that is, by one good witnesse, without exception: then ought an oath (to declare the trueth) to be imposed vpon him, and he is then bound to confesse the verie trueth.*

[3] Aquin. in quodlib. 6. q. 8. art. 12. in corpore quæst. vide plura 2. part. ca. 6. pag. 42.

Another reason thereof is; that a [4] *Iudge* may not interrogate *iudicially*: but where he is ledde thereunto by *good equitie*. But there is none equitie to *enquire*, of faultes that are absolutely *secrete* and *hidden*.

[4] L. 8. §. 1. & §. illud. quæritur. ff. de interrog.

And yet there be also certaine cases, which are excepted out of this rule: The first [5] is, when the *hidden crime* is such, as doth (by lawe) hinder the execution of function *Ecclesiastical*, or the reteyning of a *benfice*, as *Simonie*, *Irregularitie*, or such like.

[5] d. c. inquisitionis Barthol. in d. l. Marcellus. Abb. in c. cum super de confessis. Speculat. tit. de positionibus. §. 7. nu. 40.

An example [6] hereof, wee haue also in the olde *Canons* of *Councels*; where it was thus decreed: *Though he be otherwise a very good man, yet let not such be ordeined a Clerke, which is a solemne penitent*, viz. *such*, as (for some crime) hath beene put to such grieuous and *publike penance*, as was very vsuall in those straiter

[6] Conc. Cartha. 4. relatum a Gratiano di. 50. c. ex pœnitentibus.

ſtraiter times. *But if ſuch happen to bee ordeyned, through the Biſhops want of knowledge of his ſtate*; let him bee depoſed from the Clergie; *becauſe at the time of his ordination, non ſe prodidit eſſe pœnitentem, he himſelfe bewrayed not ſo much.* Then much more ought he to open it, vpon his *oath.*

The reaſon, that in all [1] ſuch matters, as do hinder the execution of an *Eccleſiaſticall* function, the partie himſelfe is to anſwere, though it be otherwiſe *ſecrete*; or that he haue done *penance* for it) is this: becauſe, (thereby) his owne good and ſafetie of conſcience, is procured: leaſt he ſhould (elſe) wrongfully liue vpon, and ſpend that, which (by lawe and right) belongs in deede and right to another, and not vnto him. And this holdeth [2] generally, whether the matter be *ciuilly*, or *criminally* moued; in caſe by concealing, the *partie*, that is to anſwere, ſhall winne and gaine, with anothers loſſe: ſauing, when by ſuch anſwere of the *partie*; ſome matter that was fully afore decided, is called (afreſh) into queſtion: for then is he not compellable to anſwere it againe.

[1] Arg. 23. q. 5 ca. prodeſt. & de renunciat. c. niſi cum pridem, §. 1. & §. propter conſcientiam. Specul. ibidem. Panor. in c. cum oporteat de accuſat.

[2] Bartol. in d. L. Marcellus. nu. 3

The ſecond [3] *exception* of the aforeſaide rule, touching not vrging to reueale *ſecret* faults; is: when as by concealing of the offence, great perill doth growe, to the *Church*, as in *hereſie*, and *dilapidating* or ſpoyle and waſte, of *an Eccleſiaſticall* liuing.

[3] Specul. ibidem. c. qualiter 2. extra. de accuſat. 22. q. 1. c. ſi quis per capillum.

If here it be asked, whether a partie be compellable to anſwere an *Interrogatorie*, or *poſition* touching his owne being *excommunicated*, or not? it is to be remembred, there be (in lawe) two kindes of *excommunication:* One is, [4] *excommunicatio Canonis*, when as the law inflicteth that *cenſure ipſo facto:* as (by ſtatute) for fighting with drawen weapon in the *Church*, or *Churchyard.*

[4] Specul. ibidem. nu. 42. & 43.

Now becauſe this cenſure ſo by law inflicted, is alwaies preſumed to be iuſt, & to binde: therefore, we are not bound (by oath) to anſwere vnto a *poſition*, or *interrogatorie*, diducing our owne being *excommunicated*; no more then we are, touching our *ſecret* faults. The ſecond, is *excõmunicatio hominis*, when as the *cenſure* is but decreed by the *Iudge.* which becauſe it may be vniuſt, and without good cauſe, (in which caſe it is called *Clauis errans*) or voyde and erroneous (as being *decreed*, after an *appellation* is made &c.) therefore it doth not (neceſſarily) binde, and conſequently ought therfore to be anſwered by the *parties* own oath,

Hitherto of offences meerely *secrete*. But when they are by *signes* or otherwise (in some lawful sort) manifested abroad, they are then of a farre different consideration. And yet if they be but blowen abroad, by reason of an *Accusation cõmenced*, or by one, who voluntarily maketh himselfe a *partie*, and so is presumed to do it of malice, or for some other sinister respect: in this case, the defendant is not to be vrged, vpon his oath to answere the truth of the crime; nor yet any thing, which very neerely & *presumptiuely* inferreth it. for no man is bound (simply) to furnish vp his aduersaries intention, who (at his owne perill) ought to come (otherwise) sufficiently prepared. Neuertheles, if the *Accuser*, or *partie*, do make an *halfe proofe*, as by one *vpright*, and vntouched witnesse, or by any thing *equiualent* thereunto in law: then may the *Iudge* tender to the *defendant* an oath (which he cannot refuse) *de veritate ipsius criminis*, in way of his purgation, or more cleare *conuiction*: by reason of the *interest*, which the *common weale*, or *Church* hath, to haue sinne punished, and all *scandall* thereupon arising, remoued. To this effect, a [1] *Canonist* writeth thus: *Seeing God alone doth know, & is Iudge of thoughts meerely secret: and that ech man is bound to preserue his owne good name, according to that of S. Augustines, viz. that man is cruell, who is careless of his good name: it doth thereupon follow, that if nothing at all be proued by the Accusour; that then a man is not bound to confesse anything against himselfe.* And [2] another to like purpose, viz. *albeit when the Iudge proceedeth of office, and the crime is not fully proued, he may enioyne purgation vnto the defendant: yet is he not bound to do it at the petition of him, who voluntarily offred himselfe* to be *promotor officij: but it is otherwise, when a necessarie promotour, who is assigned by the Iudge, doth make such petition.*

[1] Alph. Villag. lib. Pract. Can. 1. cap. 5. conclu. 1.

[2] Diaz. cap. 140.

But when the proceeding is to be of *meere office*, & where the crime is *manifested*, and *disconered* abroade, by some wayes and meanes (sufficient to ground an *Enquirie* vpõ) yet those meanes not prooued before an *Ordinarie Iudge*; the Iudge is not thereupon to vrge the *parties oath*, vpon the very *crime* it selfe: albeit [3] he may require him to sweare, whether he beleeue such an *infamie* doe runne of him; or whether he haue bene adiudged by *sentence* to bee conuicted of it: whether hee haue at any time confessed it, or whether he beleeue it, to be *notorious*. If he shall

[3] Spec. ibid. e. qualiter 1. §. finali. e. qualiter 2. V. non igitur. de accusationib.

ſhall deny to take oath to anſwere but vnto theſe, vpon his *credulitie:* he doeth thereby incurre *contumacie*, and may bee proceeded againſt, as conuicted of ſo much, as he wilfully refuſeth to anſwere. One reaſon hereof is this: becauſe he offendeth; to charge the *office* with proofe of a matter of this nature, being of it ſelfe no *crime*, and whereof he knoweth the very trueth. Another reaſon is, for that hee is not hereby accounted *to bewray himſelfe of any hidden fault*; becauſe theſe points import no crimes of themſelues, and (by common intendement) may bee otherwiſe ſufficiently knowen.

Now if the [1] partie defendant ſhall denie vpon his *oathe*, all theſe aforeſaid matters, whereof he is *interrogated*; & none other ſufficient detectiō beſides, being againſt him, thē cannot the *Ordinarie* Iudge proceed; to giue him an oath touching the trueth of the very *crime* it ſelfe obiected: vntill hee ſhall haue made proofe by *witneſſes*, that the *partie* is (in deede) thereof *infamed*, hath elſe-where *confeſſed it*, is *conuicted* thereof, or ſome ſuch like. For when all of theſe, or any of them, is either *prooued*, or by the *partie* himſelfe confeſſed *indiciallie:* then may the *Iudge* lawfully giue vnto the partie defendant, an oath; touching the trueth of the very *crime* it ſelfe: to the [2] intent (if the matter fall out true) by due tokens of penitencie to bee enioyned him; hee may be *reformed*, the *ſcandall*, and offence remooued, and others *terrified* from the like.

[1] Specul. ibidem nu. 41. & 42.

[2] Io. Andr. in c. dudum. cl. 2. de electione.

The equitie hereof is manifeſt: for [3] vpon ſuch *infamie, &c.* running vpon him, and ſo prooued, or confeſſed, he may be put to his *oathe*, with his *Compurgators*; which is [4] much more and harder for him to doe, then to deliuer the trueth, vpon his owne onely *confeſſion*.

[3] c. omnibus & c. Presbyter. 2. q. 5. de purgat. canon. per totum.

[4] Arg. c. ex parte. 3. de decimis & c. per venerabilem. qui filij ſunt legitimi.

Neuertheleſſe you are not to vnderſtand, that this *compulſion* here ſpoken of, to take ſuch *oathes*; is an *abſolute, ſimple*, or preciſe *compulſion*, but onely *cauſatiue*, as Interpreters doe call it: [5] that is to ſay, if he refuſe to *anſwere*, or to *purge* and cleare himſelfe being infamed, &c. and thereby *ſcandalous*, for ſome fault; he is but therefore to be declared for *conuicted*, to be *ſuſpended*, or otherwiſe to bee proceeded againſt, as the qualitie of the cauſe and law requireth: and none other corporall violence to wring out his aſſent vnto ſuch oath, is to be vſed.

[5] Arg. l. de reate. ff. de interrog. §. qui tacuit. c. fin. §. poena. de iniu. calumniæ.

Yet to prooue further, that by theſe lawes, an oath is appointed and may be miniſtred in ſome caſes touching a cauſe *criminall:* I will (for auoiding of tediouſneſſe) ſet downe onely the [1] places of lawe by quotations: and firſt out of the *Ciuill* (before the *Emperours* were *Chriſtians*,) and then after they were *Chriſtians*, as they be reported *in Codice Iuſtiniani*; and then out of the *Canon lawe*, taken eſpecially out of the ancient *Fathers* and *Councels*. that by peruſall thereof (as your leaſure may ſerue) you may diſcerne, vnto what member and part of the former diſtinction, each of them may ſeuerallie be reduced.

This point might be further enlarged, both by authorities of lawe, & by argument. *If he that hath* [2] *action for embezelling his goods* (which is but a *priuate*, yet a *criminall action* at the *Ciuill* law) *will put it to the defendants oath to ſweare; that hee hath not embezelled them, the defendant then muſt either take it, or elſe be conuicted thereof: Neither may he returne the oath backe vpon the plaintife: the like is obſerued in an action of theft:* which is no *publike criminall* action, at *the Ciuill* lawe. And the defendant may not anſwere [3] vnto theſe *Interrogatories criminall* by the worde *credit vel non credit*, as he may doe in *Ciuill* actions: but is to anſwere them directly, *yea*, or *no*.

Though it be but at the ſuite of a [4] priuate perſon; if hee that is *iudiciallie* interrogated, will not *anſwere* at all, or doeth anſwer obſcurely and peruerſely; he ſhall be holden *pro confeſſo*, and be condemned; no leſſe, then if he had *confeſſed* it, becauſe he therein *contemneth* the lawes, and the *Magiſtrate*. Likewiſe, at a priuate perſons ſuite and petition, the oath of [5] *Iuramentum calumniæ, de veritate dicenda, & purgationis*, is giuen by the Iudge, and [6] muſt *neceſſarily*, be taken by the *partie*, albeit the matter be *criminall*; or elſe he ſhall be taken, as *conuicted* thereof.

And when the *Accuſer* in a *criminall* cauſe, hath prooued nothing [7] beſides *probabilities* and *preſumptions*; the *Iudge* if he will may

1 l.13.§ idem Iulianus. ff. de Iureiur. l.26.& 28.d. l.vlt.ff.de in litem iurando. l.11.§.1.ff.rerum amotarum. l.qui petitorio. ff.de rei venditione.& paſſim alibi. l.vlt. C.de fide inſtrumentorum. Leo. Aug. l.6.§.vlt.C. de his qui ad eccleſiam confugiunt. Iuſtinia. A. l.vbi. C.de falſis. l.vlt.§.licentia. C.de iure deliberandi. idem A. l.vlt.C.de iure Dominij impetrando. idem A. Nou.conſt.124.& Auth.nouo iure.C. de pœna Iud.qui malè iudicauit. Auth.vt litigatores iurent. §.ſi vero. l.cum apud veteres.§.ſin autem,in fine. C.de bonis autor. iud. poſſidendis. l.penult.C.de probationibus. l.in bonæ fidei.C.de rebus creditis, & iureiurando; & ibi Apoſtilla. Nou 8.conſt.7. & ibid. gloſſæ & DD. Vide Decianũ,to.1.125.nu.9. 11.q.3.c.quiſquis: & ibidem q.vlt.c.1. 35.q.6.c. ſi duo. gl in c.ex pœnitentibus.2.q.6.in toto. 6.q 5.c.vlt. Item in princ.cum c. ſequ. 15.q 5.& c. ſi quis de gradu.4.& c.ſequ. ex. de purga. Canonica. & c.10.ibidem. c.præſentium.2.§ præterea ſingillatim cum ſua gl.de teſtibus,in 6. c. cum I.& A.de ſent. & re iudicata. & eſt communis opinio. Bartol.in l.inter omnes. §. rectè.in fine.ff.de furtis. Iul.Clar.q.45.v. ſed quæro.

2 l.Marcel. §.1. & fin.cum ll.ſeq. ff.rerum amotarum.

3 Bartol.ibid.& in l.inter omnes, ff.de furtis.& in l.de ætate.§. nihil.ff.de Interrog.act.

4 l.de ætate.12. §.qui.tacuit.ff. de Interr.c.ſi poſt.2.de confeſſis in 6.

5 c fin.& ibi DD. de iuram. calumniæ.

6 Abb.in.c.veritatis.nu.27.de dolo & contu.

7 Gail.de pace publ.li.2.c.7.& eſt comm.opinio per Socin. ſeniorem in l. ait Prætor.ff. de iureiur.

may miniſter of *Office* vnto the *partie* conuented, an oathe, touching the trueth of the crime, called *Iuramentum purgationis*, according to a former diſtinction. And this kind of *neceſſarie oath*, and the former, haue place in all *temporall* or *Ciuill* courts abroad in the world, as well as in courts *Eccleſiaſticall*. [1] Clarus. li. 5. §. fin 63. q. per Anaman. & alios.

Then, if where but a *common perſon* ſueth, either, for his own *priuate intereſt*, or for reuenge, the *Iudge* (by the *Ciuill* law) may exact ſuch *neceſſarie oaths* of the other *partie*, importing oftentimes diſcouerie of matter *criminall*, and *penall* to the defendant: how much more then may the *Iudge*, and ought hee to doe it (after good preſumptions, and probabilities had) where there is a *publike intereſt* growen vnto the *Church* or *Common weale*, to haue the very trueth knowen, for reformation of the partie and ſuppreſſing of the *ſinne* or *offence*? By all which premiſed, we may ſee the *equitie*, *neceſſitie*, and true *vſe* of ſuch oaths, by thoſe two lawes *Canon* and *Ciuill*.

Beſides thoſe lawes, it is alſo receiued and vſed by the *Municipall* and *Cuſtomarie* lawes, of many nations of *Chriſtendome*. By the lawe [2] *Feudall*, or (as we here ſpeake) of *Tenures*; ſuch oath, hath vſe in *crimes*. For if the obiected crime bee denied by the *partie*, and cannot ſufficiently be prooued; he muſt then haue twelue *compurgators* to ſweare of their *conſciences*, and *credulities* for his clearing, after himſelfe haue taken the *oath*, *De veritate vel falſitate criminis*. [2] c. Sacramentum. §. & cum datur. de conſuetudine recti feudi.

By the [3] *ordinances* and *cuſtomes* of the *Imperiall chamber* (ſeruing for all the Empire) the like oath is vſed; ſauing, that a *Nobleman* is permitted to take it by his *Procurator*, authorized by him, to ſweare *in animam ſuam*. [3] Ord. Camera Imper. tit. de Purgatione.

By the [4] *cuſtomes* of *Hungarie*, there be many, and long *conſtitutions* made, for the taking of it, and of the maner, of this kinde of oath. [4] Conſuet. Hungariæ de Iuram. Purgat.

It is teſtified [5] alſo to bee the vſuall practiſe of all the ſeuerall dominions of *Italie*, that the partie conuented in *Temporall courts*, whether by way of *Accuſation*, or at the proſecution of another, or by way of *Enquirie ex officio Iudicis*: muſt ſweare to declare the trueth, in all thoſe things, that ſhall be asked of him, euen of the *crime* it ſelfe. [5] Marian. in c. qualiter. q. 84. Caſonus in Pract. fol. 84. nu. 3.

Which proceeding, is farre more grieuous and ſtrict, then is or may

may be vſed, in any *eccleſiaſticall* courts, or any other in *England*. For at the ſuite of a *partie*, a man is not in any *eccleſiaſticall* court (here) to be ſworne *De veritate ipſius criminis*, except there bee cauſe for the *Iudge ex officio*, to enioine him his *purgation*. And an other point of greater rigour there is; that they giue ſuch an oath, not only, where ſome *corporall puniſhment* is to be inflicted, as in the *Starre-chamber* is vſed: but, where it is *capitall* to the *partie*, or tendeth to the *mutilation* of limmes: a courſe not allowed by the *lawes* and pollicie of this land.

[1] Ordonnances du France. liu. 2. tom. 2. tilt. 14 du droict, de refuehaut paſſage, &c. pag. 1195.

[1] *For merchandiſe to bee caried out of the Realme of France, the Merchant muſt make a declaration vnder his owne hand, of the particulars thereof, and the weight, or meaſure, in what ſhip, and whither he will carrie it, and that there is no more, then is there ſet downe; and that there be no deceitfull nor forbidden merchandiſe there: and for the trueth of ſuch note, or declaration; he muſt take an oath, vpon the holy Euangeliſts.*

They haue alſo another *ordonnance* in *France* to like purpoſe of ſwearing; reaching to all *Plaintifes declarations*, &c. and to all *defendants anſwers*, &c. without any diſtinction, whether the ſame tend to diſcouer any *crime* of either of them, or no. For [2] *the parties are bounde by oathe to affirme, touching the factes conteined in their billes and additions: and by their anſwere vpon oathe vnto Interrogatories, to confeſſe thoſe, which be within their knowledge.*

[2] Ordonnance du France premier, an. 1539. art. 38.

In other matters *criminall*, it is reported to be the [3] cuſtome of *France*, for the *partie* defendant, onely to *make fayth*, when they are obiected. and hee is thereupon to anſwere; whether he haue committed them, or not: but hee is not to take a *corporall oathe*. betwixt which two (before God) there is no difference. But by the [4] *cuſtomes of Normandie*, I finde; that the appealed of *murther*, or ſuch like, (when it is to bee tried by *battaile*) *muſt vpon his oathe (holding his aduerſarie by the hand) ſolemnelie ſweare, whether hee hath committed ſuch facte or no*; in the very ſelfe ſame wordes, and maner, as *Stanford* (afore alleadged) affirmeth to bee the *lawe of England*, in like caſe of *Appeale*.

[3] Marcus. deciſione. 674.

[4] Grand Couſtumier entre les couſtumes, de Normandie.

Generally, ỳ to giue [5] an oath to the *partie* conuẽted in a cauſe *criminall*, to tell the trueth; is the preſent vſuall *practiſe* of moſt nations

[5] Bartol. in l. inter omnes. §. rebus. ff. de furtis.

nations abroad: and [1] that the *common opinion* of writers in theſe two lawes is; that it may bee ſo giuen, euen by the lawe *Ciuill* (which is their *common lawe*) doeth appeare by the places of *Authors* here quoted, in the margent.

[1] Auguſt. ad Angel. de maleficijs in ver. comparuerunt. Bertrand. conſil. 321. nu. 3. li. 3. in prima parte. Marſil. in l. quæſtio habēdæ. nu. 72. ff. de quæſtionibus. Conradus in Practica, fol. 280. & Gomez. ca. 1. Delictorum. nu. 65.

Amongſt nations of farre elder times (in moſt flouriſhing *common weales*) we finde *oathes* in all cauſes, whether *Ciuillie* or *Criminallie* mooued; to haue bene taken, both by the *plaintifes*, and alſo by the *defendants*. Amongſt the [2] *Athenians*, both *parties* tooke oathes; and beſides that, did lay downe a certaine ſumme of money, to be forfeited by him that ſhould bee ouerthrowen. The *Plaintifes*, or *Accuſers* oath was; that he would obiect nothing but true crimes and matters. This was called: ἀγωμοσία: and the *defendant* ſware, that he would deale, and anſwere plainlie, not fraudulently, and cautelouſly, and this was called ἀντωμοσία.

[2] Ex Polluce Sigonius. li. 4. ca. 4. de republica Athenienſi. Suidas in verbo,

When *Æſchines* accuſed *Timarchus* of a fowle crime, ſuppoſed to be done vpon him by one [3] *Miſgolas*, he ſaieth thus: that *if Miſgolas being called, and vrged to beare witneſſe, ſhall denie it, to the intent to gratifie Timarchus: hee ſhall thereby doe him no good, becauſe Æſchines can proone it by witneſſes: but ſhall only forſweare himſelfe, and withall ſhew how cunningly hee can couer ſuch villanies.* Whereby appeareth, that (in that common wealth) oaths might bee giuen in matters *criminall*, tending to the opening of their owne *turpitude*, as well as of other mens.

[3] Æſchines contra Timarchum. pag. 7. Græce.

Radamanthus for his ſeuere, and ſtrict courſe of *Iuſtice* holden; was fained by *Poets* (like as *Æacus* and *Minos* alſo were) to be a *Iudge* in another world, ouer ghoſts deceaſſed. Of him [4] *Plato* thus writeth to our purpoſe: *I am perſwaded* (ſaieth he) *that Radamanthus deſerued to bee had in great admiration. for he perceiued, how in thoſe dayes, all men confeſſed, that there were gods, which had regard ouer humane actions. therefore he thought beſt, to commit deciding of matters in iudgement, vnto gods, and not vnto men. So that by a very plaine and eaſie courſe, hee ended all matters of iudgement, for hee exacting an oath in euery cauſe in controuerſie, vſed thereby, no leſſe ſpeedily, then ſafely, to giue his iudgements.*

[4] Plato lib. 12. de legibus.

[5] *Ariſtotle* alſo *Plato* his ſcholer teſtifieth the like; that in olde times, ſuppoſed offenders that were called into queſtion, were ſome of them proceeded with vpō their oaths, & other without.

[5] Libr. 3. Polit. c. 10.

and their oath was performed by *holding vp of a ſcepter.*

[1] Herodotus in Erato, lib. 6.

The hiſtorie of *Glaucus* [1] an auncient *Spartan*, doeth giue plaine euidence; that amongſt that moſt iuſt people of *Greece*, a man that would denie a thing to haue bene left with him *in depoſito*, that is, *in truſt to keepe*; was to take his oathe, whether it was ſo left with him, or not; and conſequentlie was to ſweare of matter tending either to periurie, or to his *diſhoneſtie*, and *ſhame*, hauing once vniuſtly denied it afore, to the defeating of his right, who had truſted him. For the ſaid *Glaucus* his whole houſe and poſteritie was rooted out by Gods vengeance; onely for that a while hee denied it, and had once in purpoſe, to haue forſworne the money, which was (in deede) left with him, vpon truſt: and thereupon conſulted with the Oracle at *Delphos*, whether he had beſt forſweare himſelfe, or deliuer the money.

The vſe of an oath in matters *criminall*, amongſt the people of *Greece*, may be prooued to be moſt ancient, by that purgation, which king *Agamemnon* made to cleare himſelfe, that he had not liued incontinently with *Hippodamia*. this his purgation is recorded to haue bene made in this forme: [2] *Hee commanded two Sergeants to bring the hoſte or ſacrifice: which being by two lifted vp from the earth; Agamemnon drewe out his ſworde, and therewith dinided it into two partes, and cauſed it in the preſence of all, to be laied downe; then holding in his hand the bloudie ſworde, hee went betwixt the two partes of the ſacrifice, and when hee was paſſed through, he then ſware, that he had neuer polluted Hippodamia, by incontinencie.*

[2] Dictys. Cretenſis. lib. 2. belli Troiani,

[3] Homer. lib. 19. Iliad. v. 257.

Homer [3] mentioneth, that the ſame *king*, in another forme *cleared* himſelfe, that he had not violated *Briſeis*. For at that *purgation*, a Boare was offered vp by *Talthibius*; then *Agamemnon* cut off ſome of the Boares briſtles, and offered them to *Iupiter*: ſwearing withall, that he had not violated *Briſeis*, and the Boare was after, tumbled into the ſea.

[4] Pauſanias in Eliacis,

For *clearing* men from ſuſpicion of all lewd and ſiniſter dealing, not onely thoſe which came to ſtriue [4] at the ſolemne exerciſes and games of *Olympus*, but their *parents* alſo, and *brethren*, were ſworne ouer the entrailes of a ſacrificed hogge; that they had vſed no fraude, or deceit whatſoeuer: nor done otherwiſe,

then

then the *ordonnances* for *Olympus*, did permit. So much then for the vſe thereof among the old *Græcians*.

In the old *Romane common*[1] *wealth*, we read, that, euen priuate houſholders did lawfully impoſe ſuch an oathe vpon their labourers, that gathered *Olives: videlicet*, that, *neither themſelues nor yet any other by their couin, or fraude, had ſtollen, or embezelled away either oyle, or olives: which oathe if they refuſed, they neither had any wages, nor any oyle or olives.* For as it is by[2] lawe, that when *probable tokens* or *preſumptions, &c.* doe appeare; hee that refuſeth to take oathe (though the cauſe bee *criminall*) is reputed conuicted thereof: So was it holden among the *olde Romanes* for an aſſured note of guiltineſſe, to refuſe to take ſuch oathe. as may bee noted by the hiſtorie of *Victorinus*, when hee was *lord Generall* of *Germanie*. for[3] hauing his *Legate* or *Lieutenant* in ſome ſuſpicion for corruption, he did (priuately) ſeeke to perſwade with him, to take an oathe; that hee would not ſuffer himſelfe to be bribed. which when he could not obtaine of him, the *Generall* himſelfe came into the *Tribunall* ſeate; and there did ſweare, that he neither had, nor euer would accept of anie bribes. then he commanded his *Legate* to take and binde himſelfe with the like oathe; which becauſe hee refuſed, the *Generall* commanded, that hee ſhould giue ouer his *office* and place. And that it might bee better diſcerned, whether any man vpon guiltineſſe of his owne conſcience, would at taking his oathe, blanch, & alter the very words of the oath: they ſomtimes deuiſed to haue *a ſolemne oath*, whereby he that gaue the oath, did vtter certaine *ſet, and conceiued words*, as he thought fitteſt; which he that ſware was preciſelie to follow, or elſe it ſerued not his turne, as afore hath bene noted. This they called *Conceptis verbis iurare*, and the *Græcians* termed it, ἐρκος ἐπακτὸν, *a ſolemne impoſed oath*. An example hereof in a very fowle cauſe, we reade in[4] *Cornelius Tacitus*.

[1] Cato de re ruſt. ca. 144, & 145.

[2] c. fin. §. 1. de iuram. calum. & c. inter ſolicitudines. d.

[3] Xiphilinus in Commodo.

[4] Tacit. lib. 2. Annalium.

The Senate conceiued a forme of oath, and the chiefe of them firſt beginning to take it, prouoked by their example all the reſt of the Magiſtrates as they were asked their voyces, to call God to witneſſe; that by their meanes, nothing had bene done, whereby the ſafetie of any citizen might bee hurt; nor that they had gotten either reward or

honour, through the calamitie of any other Citizens. but it was perceiued, that ſuch as had a guiltie conſcience herein, did come but tremblinglie to it, and chaunged the ſet conceiued wordes of the oathe, like as thoſe are woont to doe, who ſweare falſely or cautelouſlie.

When the *Prætor* one of the[1] chiefe *Magiſtrates* of *Rome*, had made choice of 450. Iudges, for deciding of cauſes; he was (by lawe, for his owne *clearing*) to ſweare; that *hee had not wittingly choſen any of them dolo malo, viz.* by *fraud, mal-engine*, or for any other *ſiniſter* reſpect.

[1] Lex Seruilia Glauciæ, apud Sigonium. li. 2. ca. 6. de iudicijs.

By all which the premiſſes out of the *Canon, Ciuill*, and the *lawes*, and *cuſtomes*, of other nations, may appeare; how *lawfull* and *equall* a courſe it was by them alſo holden (vpon ſundry occaſions) to vrge oaths; though ſome matter *criminall* in the partie himſelfe, might thereby be diſcloſed.

CHAP. X.

An anſwere to ſome obiections, pretended to be made againſt this kind of oath, from the lawes Ciuil, *or* Canon.

IN this Chapter, ſuch obiections, as already are, and ſome which perhaps hereafter may bee made againſt this kind of oath from the *Ciuill*, or *Canon* lawes; come to be anſwered. Of theſe, moſt be made by the *Treatiſour*, &c. and ſome may hereafter be obiected (perhaps) by others. The *Treatiſours*, be either againſt ſome circumſtances about it; or elſe againſt the *oath* it ſelfe. But firſt, touching his by-matters, or circumſtances.

Becauſe the priuate Schedule (concerning theſe oaths) which was ſet downe by certaine *Doctors*, (as is mentioned *in the epiſtle to the Reader*) conteineth; that, the defendant in a cauſe *criminall*, is to anſwere other *Articles*, ſo they be not tending to the *crime* it ſelfe, though it be at the ſuite of *a partie:* hee ſaieth, that the *Maxime*, of *nemo tenetur ſeipſum prodere, is* (thereby) *ſo weakened, as it will ſcarcely nowe ſerue for a Minime*. For reaſon of this conſequence; hee asketh, *if this be not to goe like the crabbe, oblique, and to proceed the ſame way, although not to treade the direct*

direct ſteppes? and asketh alſo, what ſhould be meant by other *articles*, but ſuch *as concerne circumſtances, and inducements to the crimes?*

He is therefore to vnderſtand, that at the ſuite of *a partie*, a man (by thoſe lawes) is neither to anſwere *criminous* articles diducing [1] the very crime it ſelfe, nor yet ſuch, as haue any neere coherence thereto, or be *propinqui Actus ipſi maleficio.* But of other matters hauing none affinitie with the very *crime*; as whether he be of that *Iuriſdiction*, and ſuch like; the defendant is by vertue of his oath (euen at another mans ſuite) to anſwere: and therefore no ſuch *crooked* meaſure is offered herein at all. But *he ſeeth no reaſon* (he ſaith) *why there ſhould be any difference betweene the ſuite, and inſtance of the partie, and the proceeding ex officio:* in that, *the reaſon* alledged for to make a difference, *is but this*: Penancies enioyned by Ordinaries, are not taken in lawe for *pœna*, but *medicina.* If he ſee not this, why there ſhould be any difference betweene thoſe two proceedings; I maruaile then, what cauſe he can ſee, ſo highly elſe-where, to magnifie the courſe of proceeding by an *Accuſour*, as very *equall*, and *iuſt*: but to condemne (ſimply) all proceeding *of Office, as vniuſt, forreine, cruell, heatheniſh*, and *prophane*, and I know not what.

[1] Angelus de maleficijs.

That he may therefore *ſee* great cauſe of *difference* betwixt theſe two; let him a litle weigh with himſelfe, what the reaſon (at the *common law*) ſhould be; why an *Appellee* is allowed more freedome in ſundry reſpects, then a man *endited* at the *Q.* ſuite *ex officio* ſimply? and why, he may then put it to *tryall by battaile* with the *appellor*; but cannot haue that *tryall*, vpon an *Inditement?* And alſo, why a defendant, againſt whom an *Information* is preferred for ſome *criminall* matter in the Courtes of the *Q. Bench, common pleas*, or *Exchequer* (which neuertheleſſe is by a kinde of proceeding *mixt* of both the kindes) ſhall not be vrged to anſwere, the *bill*, or any *interrogatories* vpon his oath, as all defendants in *Criminall* cauſes, be forced to doe in the *Starchamber?* He is alſo to be put in minde, that men vſe not in ſuch briefe ſchedules as that was; to alledge for euery matter, all the reaſons they can: yet that one alledged, is of it ſelfe a *reaſon* ſufficient, of ſuch diuerſitie. for is there as great reaſon, that I ſhould vpon mine *oath* diſcouer my crimes, being no way

therof duely *infamed*, or they otherwiſe proued, for the ſatisfaction onely of mine aduerſaries malicious humor by mine owne more grieuous puniſhment: as there is (when theſe or ſome like be precedent) that I ſhould to mine *Ordinary* or *Spirituall father*; who in a farre milder courſe, for his duties ſake, & in *charitie*, ſeeketh my good, by reformation of me, & amendment in me; and by remouing the *ſcandal*, which els might iuſtly be taken againſt me? And (by the *Canon* lawe) as is elſe-where touched, *mitiùs agitur cum inquiſito conuicto, quàm cum accuſato conuicto.* Seing then vpon *conuiction* by way of *accuſation*, the very *ordinarie* penaltie by law appointed, is (for the terrour of others) impoſed without any mitigation: therfore the oath cannot ſo reaſonably thereupon be exacted, as it may vpō the *Iudges* proceedings, by his *meere office*, vnto a farre other more milde end, for ỹ moſt part.

But as if thoſe *Doctors* had abſolutely denyed *penances*, which be enioyned *ex officio Iudicis*, to be any *puniſhments* at al, becauſe they are ſaid to be *medicinæ*: he aſketh, *whether penance, although it be but ſtanding in a ſheete, aſwell as the ſtanding on the Pillorie (in reſpect of publike ſhame grieuous and odious to all men) ſhall not bee accounted a puniſhment?*

I anſwere, that neither the law, nor thoſe *Doctors* in ſaying they be *medicinæ, non pœnæ*, doe thereby deny *abſolutely* (as he reaſoneth) that they be *puniſhments*. For this ſaying of the lawe, is a *Negatiue* by *compariſon* only; which the *Treatiſor* either would not, or did not vnderſtand, to be none *abſolute denial*. and that *penances* (in deed) be ſo, we may learne by *S.*[1] *Auguſtine* ſpeaking hereof in this maner: *quis non intelligit magis beneficium, quàm ſupplicium nuncupandum, vbi nec ſæuiendi relaxatur audacia, nec pœnitendi ſalutaris medicina ſubtrahitur?* Standing on the *Pillorie* which (as I take it) by a word borrowed of the *Græcians*, may be termed *catamidiatio*; it was euen of ancient times, (aſwell as at this day) accounted an *infamous* puniſhment vnto the *partie*, that endured it: and is allowed, for a good proofe of *infamie* by law. but he that hath done *publike penance*, is not (in lawe) to be accounted therfore *infamous*: but rather to be a man amended and reformed; and ſuch, as at whoſe conuerſion, the *Angels in heauen doe reioyce*. and therefore his companie is not afterward to be ſhunned or auoyded, by any diſcreete or moderate *Chriſtian*; as if he

[1] Auguſt. epiſtola. 159. ad Marcellum.

he were ſtill a man of ſteined credit, or conuerſation. So that the great diuerſitie of the endes, whereunto theſe be referred; doe make a very notable *difference* in the *puniſhments* themſelues. For in the one of thē, the delinquent is propounded for a publike ſpectacle of ſhame & reproch, to be ſhunned of all men: the other, by theſe outward tokens of *humilitie* & *ſubmiſſion*, teſtifieth his inward ſorow & griefe for the ſinne, and as it were thereby craueth (in pitie and compaſſion) to be receiued againe, into the *Chriſtian* fellowſhip, as a man (by *repentance*) fully reconciled againe vnto God, and vnto his *Church*. Hitherto in anſwere of his obiections made againſt ſome *by-circumſtances* of ſuch oath.

Againſt the *oath* it ſelfe, the *Treatiſour* bringeth ſome *reaſons*, ſome *allegations* frō lawyers, & ſome out of the lawes thēſelues. Firſt he ſaith, there is no *Iuſtice* in the proceeding, at giuing ſuch *oath:* becauſe there be not three in Iudgement, viz. the *plaintife*, the *defendant*, and the *Iudge*; and thereunto alledgeth *Bracton*.

But what if the maner of proceeding *ex officio* were vniuſt, which in ȳ ſecond part is ſhewed to be otherwiſe; can this proue the miniſtring of an *oath* to the defendant in a *Criminall cauſe*, to be vnlawfull? For firſt, proceeding *ex officio* may be, euen where the matter is *Ciuill*, or *criminall*, howbeit but *Ciuilly* moued, and there (for the moſt part) none oath is vſed. Secondly, it may be, when none *oath* touching any crime, is to be miniſtred to the defendant at all. Laſtly, an *oath* in a cauſe *criminall* may ſometimes be tendered, where the proceeding is not of *office* at all, but hauing all theſe three perſons in iudgement, and that not by *implication* or repreſentatiuely only: but euen *formally*. and therefore (in all thoſe reſpects) his argument doth not follow. yet for further anſwere, I muſt alſo tell him, that in all due proceeding *of office*, there be *three perſons in iudgement*. For (as hath bene ſaid) that which openeth way to ſuch *Enquirie*, doth repreſent, and ſtandeth in ſtead of a *Plaintife*, for preferring vp of the matter.

Againe, that an expreſſed and *formall plaintife* to preferre vp matter *criminall*, is not alwayes required; is [1] manifoldly ſhewed, by often practiſes recorded in the word of God it ſelfe, to the contrary. [1] Cap. 15. & 16. 2. part.

He concludeth alſo againſt *generall oathes, and againſt extorting (by oath) of the ground and foundation of Inquiſition from the*

partie conuented: out of the ſaide little ſchedule of the *Doctors.* From which concluſion albeit not following of thoſe premiſſes; we do not any way debarre him; ſeeing no ſuch *practiſe* is either allowed, or (I thinke) in this Realme heard of. and therefore he wrongeth all *Eccleſiaſticall* courts the more, who ſo often heapeth vp theſe vntrue and vnlikely imputations againſt them. An other of his allegations, is out of [1] *Iulius Clarus*, to prooue (forſooth) by *Canons*, and *Canoniſts*, this kinde of *oath* to be *a prophane, and more then heatheniſh maner of Inquiſition*, (for ſuch is the mildeneſſe of the mans ſpirit) and *contrary (if he be not deceiued) to the rules and Canons of the Antichriſtian Church of Rome, which be more iuſt* (he ſaith) *or leſſe vniuſt a great deale then ſuch, as haue taken vpon them to iudge, by colour of the ſame.* for *procedere* (ſaith *Clarus*) *ex officio mero, eſt quando Iudex a ſeipſo, & ex officio aſſumit informationes, contra deliquentem, & contra eum procedit* &c. wherupon, he gathereth, that *to proceede by Inquiſition, is not to make the partie by oath or examination to be his owne accuſer; but to receiue information, and witneſſes againſt him.* This, which he thence collecteth, of not compelling the *partie* defendant by oath, to become his *owne Accuſer* is true, if it be as truely vnderſtood, though it be not inferred truely from that allegation. for no man is by *oath*, ſo compelled: but rather by diſcouery of the whole trueth, to *cleare* himſelfe of the *crime* after he be (as it were) *accuſed*, and brought into queſtion by ſome of thoſe *lawfull* meanes, which open a way vnto *ſpeciall Enquirie.* Beſides, this allegation maketh nothing for proofe of the vnlawfulneſſe of ſuch oath, after ſufficient detection. For *Clarus* in this place, ſpeaketh onely of the *proceſſe*, or *enquirie informatiue*, grounded vpon ſome *Clamoſa inſinuatio*, or *ſcandall*; and not of any part of *proceſſe punitiue*, which followeth vpon the former: at what time the oath of the partie, is to be taken. which thing, the ſame *Authour*, (thorowout his whole booke) moſt plainely ſheweth: if it had pleaſed the *Treatiſour* to haue peruſed but a little more of it. This therfore is a *fallacie*, of not diſputing *ad idem:* beſides, *inciuile eſt, niſi tota lege perſpecta, iudicare.*

[1] Clar. in pract. Crim. q. 3.

Ignoratio Elenchi.

The next of his *allegations*, is out of a meere [2] *Ciuilian* writer and no *Canoniſt*, as he ſuppoſed: with whom he hath the ſame, and no better lucke, then he had afore with the other; for want

[2] Io. Petr. Ferrar. forma Inquiſit. ver. forma publica.

of

of knowledge to diſtinguiſh, betwixt *Proceſſe informative*, and *Punitiue*: for thereof onely *Petr. de Ferrarijs* there ſpeaketh, not once mentioning an oath: Albeit the *Treatiſour* doe gather, both that and other things alſo thereof, which bee not there conteyned; which I will not nowe *trauerſe* with him; becauſe they tende not to our principall purpoſe.

Out of the lawe it ſelfe, hee taketh holde of that *Rule*, which the ſayde *Doctors* did alledge, viz. *nemo tenetur ſeipſum prodere.* but that *proditus per famam &c. tenetur ſeipſum oſtendere & purgare*, &c. (which they did alſo adioyne) he cannot in any ſorte brooke, or digeſt, *as a gloſſe*, (he ſayeth) *confounding the text.* yet is it not any *gloſſe*, but aſwell warranted by lawe; as the *rule* it ſelfe. neither doth it *confound*, but ſhewe, howe that *rule* is (truely) to bee vnderſtoode: ſo that one part of the lawe (without any *antinomie*) may ſtand with another. This himſelfe might haue remembred to bee lawe, euen by occaſion of his owne allegation elſe-where, viz. that *ſuch as refuſe to ſweare or anſwere vnto Articles, are by the Eccleſiaſticall lawe, to bee holden pro confeſſis.* If then that lawe doe ſo deepely puniſh the contemptuous in that behalfe; as to *conuict* them therefore, of the very crime imputed: may wee not gather, that the lawes *Ciuill* and *Canon*, require men to anſwere euen matters *Criminall*, vpon their oathes?

But if the *Canon* lawe ſhall bee by others alledged, to auouch ſuch oath, as we heere treate of: to this *allegation* in ſeuerall places the *Treatiſour* maketh theſe ſeuerall anſweres following. Firſt, hee ſayeth, that ſuch oath is *againſt Gods word*, and therefore *no binding lawe:* for which conſequence, hee alledgeth *Saint Germaine, in his booke of Doctor and Student.* Secondly, that the two ſtatutes of *Submiſſion of the Clergie*, made in king Henrie the eight his time (ſtill [1] continuing in force) doe take away the *Canon* lawe. Thirdly, that this kinde of *oath* is contrary to the lawes of the *Realme.* All which aſſeuerations are nothing elſe, but begging of that, which is the principall controuerſie. [1] 25.H.8. 27.H.8.

Touching the firſt of theſe, it commeth in the next Chapter to bee diſcuſſed; whether, miniſtring of ſuch oath,

be againſt *Gods word*, or no. For the ſecond, thoſe two ſtatutes are ſo farre, from taking the *Canon lawe* away, that both of them doe (in trueth) eſtabliſh, all *Canons* being of that qualitie, as is there expreſſed; vnto all which wee auerre, this *oath* to bee conſonant. The *Clergie* (in deede) doe there promiſe, not to *enact or put in vre, any newe Canons, &c. without the kings expreſſe aſſent*: of which ſorte, this oath is none; for it hath beene prooued by farre elder *Canons*, then that time. Concerning the third, wee haue ſhewed; that there is not any great *diuerſitie* betwixt thoſe two lawes in this poynt: & therefore much leſſe, can there bee any *contrarietie*, or repugnancie.

Laſtly, hereto hee anſwereth; that *if any man ſhall ſeeke by long practiſe and continuance, to giue a new probate vnto the Pontificall lawe*, after *ſo publike a condemnation, and firing thereof by Doctor Luther*: ſuch muſt vnderſtand from him, that *this kingdome is not ſubiect to any forreine made lawes, ſaue ſuch, as* [1] *agree to the Preamble* of the ſtatute, eſtabliſhing *diſpenſations*. A man woulde thinke, if any part of *Canon* lawe ſhould ſwarue from thoſe conditions required to make them *Engliſh lawes*: that *diſpenſations*, (which of all other are moſt *ſtrict*, and neuer afore that time ſpedde in this Realme) ſhoulde bee holden for *forren lawes*, rather then this kinde of *oath*, ſo vſuall afore and ſince in moſt courtes. yet theſe *diſpenſations* are alſo there approoued for *Engliſh lawes*. Let him therefore *vnderſtand*; that, all thoſe things there required (viz. *ſufferance, conſent*, and *cuſtome*) to make the *Canons* eſtabliſhing ſuch *oathes* to be accounted the *cuſtomed, and ancient lawes of this Realme, originally eſtabliſhed as lawes of the ſame*; doe in theſe oathes ſo aptly concurre (as hath beene prooued) that none of his confident denials thereof, can or ſhall bee able any more, to empeach them from ſo being: then the burning of the *Canon* lawe at *Wittenberge* by *Luther* (when the *Pope* had burnt his bookes at *Rome*) either did, was meant, or yet coulde abrogate the continuall vſe of a great part thereof in *Germanie*, euen vntill this day; or then it coulde, or ought to haue any force to diſanull it here in *England*. for the ſtatute eſtabliſhing ſuch *Canons* as there bee mentioned, was made

[1] 25. H 8. ca. 21.

in

in the ſelfe ſame *Parliament* and *Seſſion* thereof; that this *Preamble* was before the ſtatute of *Diſpenſations*, whereby hee woulde nowe ouerthrowe the *Canon* lawe wholly. And both of thoſe ſtatutes, at the beginning of her *Maieſties* reigne, were reuiued againe in one Act. Howe can there then bee any ſuch *contrarietie*, or *abrogation generall* of the *Canon* lawe, as this man dreameth of: except all that were preſent in thoſe two *Parliaments*, had bene faſt on ſleepe, when they twiſe paſſed them both together for *ſtatutes?*

Others perhaps (to as good purpoſe) will obiect; that ancient cuſtome of *Rome*, viz. [1] *Virginem Veſtalem, & Flaminem Dialem, in mea iuriſdictione iurare non cogam.* hereof [2] *Plutarch* doth ſet downe three reaſons: firſt, that *an oath is a kinde of torture to a free man: Secondly, for that it is abſurd in ſmaller cauſes not to credite their wordes; who for the higheſt matters touching God, are credited, and put in truſt. Thirdly, for that an oath draweth after it, an imprecation or curſe, in caſe hee ſhoulde be forſworne: which ſeemeth to be a deteſtable omination, towards the Prieſts of God.*

[1] Gell. lib. 10. cap. 15.
[2] Feneſt. de Sacerd. cap. 6.
[2] Plutarch. probl. 43.

Firſt, then wee ſee hereby, in ſo much as this was a *peculiar priuiledge* graunted to theſe: that therefore all others might (by *Magiſtrates*) be put to their *oathes*. And ſecondly, that it was from all *ſwearing abſolutely*; and not in matters *criminall* onely, which is our preſent controuerſie.

For ſo *Liuie* alſo [3] teſtifieth hereof, where hee ſayth, that *Flamen Dialis* amongs the *Romanes*, *might in no caſe at all ſweare, leaſt at any time he ſhoulde forſweare. which in him was holden, as the moſt heynous thing, that coulde happen.* Thus farre in anſwere vnto obiections, made out of thoſe two lawes.

[3] Liuius lib. 31.

CHAP. XI.

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That not onely ſuch an oath may be taken, but alſo being by Magiſtrates duely commaunded, ought not to be refuſed, is approued by Scriptures; by practiſe of the Primitiue Church; and of late times; together with a Replie vnto certaine anſweres, made vnto ſome proofes here vſed.

THe *Innouators* finding but ſmall reliefe in the lawes (being rightly vnderſtoode) doe flee, (as it is meete) vnto the word of God. yet as hoping (fall worſt that may) to bee iudges thereof in their owne cauſes; and ſo to ſhrowd their diſobedience in refuſing to be *examined* vpon *oath*; vnder pretence of *conſcience*, and of a religious care not to offend God thereby.

And therefore they holde; that, they are by *Gods lawe* bound, not to anſwere (in that ſort) vpon their oath: which is more then if they had onely ſayd; that they are not bound, and ſo left at libertie, either to anſwere, or not, as themſelues ſhould thinke good. whereby they would leaue a dangerous impreſſion in the peoples mindes; that ſuch lawes of this land (wherein they are borne ſubiects, and by which they are to be gouerned) may not be obeyed *of Gods people*, with a ſafe conſcience; as being contrary to the word of *God*. A matter aſſuredly of moſt perillous conſequence, to leaue vnto the onely ſcanning and finall determination of euery priuate ſubiect; how farre he neede to obey the *poſitiue lawes* of his countrey. As it commeth therefore orderly in this place, ſo is it alſo a matter moſt fit to be diſcuſſed: whether the *oath of a partie in a cauſe criminall, & penall to himſelfe, may be exacted, & vrged by the Magiſtrate, without breach of Gods law: and conſequently not to be refuſed by the ſubiect.*

[1] Rom. 13. ver. 1. 2. & 5.

It is ſaid in [1] Scripture, that *euery ſoule muſt be ſubiect vnto the higher powers, for there is no power but of God; & the powers that be, are ordeined of God: and therefore whoſoeuer reſiſteth the power, reſiſteth the ordinance of God, and that they which reſiſt, ſhall receiue to themſelues iudgement: That we* [2] *muſt be ſubiect, not becauſe of wrath onely, but alſo for conſcience ſake.* And [3] we are commanded *to be ſubiect to Principalities and Powers, and to be obedient.*

[2] Tit. 3. ver. 1. & 1. Pet. 2. ver. 13.

And

And *to ſubmit our ſelues* πάσῃ ἀνθρωπίνῃ κτίσει διὰ τὸν κύριον, *to all manner ordinance of man*, viz. *publike gouernement, for the Lords ſake.* By *which power, ordinance of man*, or *publike gouernment*, are not onely vnderſtood all kindes of *Magiſtracie*, and *ſuperiour authoritie*; and that we may not reſiſt, doe violence, or offer contempt to their perſons; but much more, that we are to fulfill, and obſerue all their *politique* lawes, without wilfull breach of them, ſo they be not repugnant vnto *Gods word*. For if this happen, then that hath [1] place, *It is better to obey God then man*. And if they command contrary things, we muſt remember that *wee* [2] *cannot ſerue two maſters.*

[1] Act. Apoſt. ca. 5. v. 29.
[2] Matt. 6. v. 24.

Yet *Gods word* doeth not abrogate lawes, common wealthes, nor ciuill policies, but doeth eſtabliſh them. Therefore, except they which refuſe to take ſuch *oath*, can ſhew ſome direct *Prohibition* either *expreſſed*, or to be neceſſarilie, and immediately gathered out of *Gods worde* againſt it; they muſt know, that their contempt and diſobedience (in this behalfe) reacheth vnto God himſelfe; whoſe *ordinance*, both the *Magiſtrate*, and his *lawes* be.

S. [3] *Auguſtine* hereof writeth thus; *contumaciæ crimen eſt, quod iubetur contemnere; quod præcipitur nolle; quod imperatum eſt, declinare.* But more particularly to our purpoſe in handling, it may bee prooued by *a generall Councell*; that hee which holdeth his peace, when he is asked, or will not directly anſwere; is wilfully diſobedient, and may bee conuicted for ſuch his ſtubbernneſſe. For [4] when as one *Photius was demaunded by the Councell, whether he would admit of the ordinances of the holy Fathers, and he anſwered not any thing thereto; the Preſidents of the Synode ſignified vnto him, that by his ſilence, he ſhould not eſcape from being condemned; which (thereby) was made more manifeſt*. And to like purpoſe, a late *Schooleman* writeth: [5] *When any thing is asked of the defendant, but according to order of lawe, he is vpon paine of deadly ſinne, bound to reueale the trueth, yea though he be not ſworne, but much more vpon his oath.* Therefore is it well gathered, that he, which beyng duely interrogated (though it be touching an offence) and refuſeth to anſwere as hee ought: firſt offendeth againſt *Iuſtice*, and againſt the [6] *glorie of God*. Secondlie, hee offendeth againſt the *reuerence of the Iudge*, whom he is bound to obey, if he bee

[3] Auguſt. de verb. Domini ſerm. 37.
[4] Synod. General. 8. Actione. 5.
[5] Sotus de iuſt. & iure, lib. 5. q. 6.
[6] Ioſu. 7.

vnder his iurisdiction. Lastly, against the *Common-weale*, which hath [1] a great interest to haue crimes discouered, and punished. Concerning the second of these; it is by great, and (some of them) ancient [2] *Ciuill* interpreters deliuered: *If a man (who hath sworne that he will neuer take oath) yet hauing a suite, shall be commanded by the Iudge (according to lawe) to take iuramentum calumniæ, and thereupon doeth take it; that he shall not (thereby) be accounted to be periured, because such commaundement of the Iudge, doeth excuse him.*

[1] l. ita vulneratus. §. ad l. Aquil.

[2] Cyuus & alij in l. 2. §. quod si actor. C. de iuram. calum.

For mine owne part, I haue alwayes taken it to be a [3] grosse error in *Diuinitie* to affirme; that a man may not holde any humane matter with a certaine perswasion, nor doe any thing in externall actions, but such onely as we haue a *positiue*, or *affirmatiue* warrant for, in the word of God. For if this were a true *position*; then a man might beleeue no historie to be true, which is not in the *Bible*; no *Maximes*, or grounds of any sciences, nor common principles, left knowen vnto vs by the light of nature (as that *two and two make fowre*) nor that there is any such countrey as *America*, *&c.* neither might a man (with safe conscience) doe infinite many things permitted by humane lawes, and sundry of them also commaunded to be done: because all these *histories* and *Principles*, and the most of these *lawes* be such; as can neuer (by any sound reason) be positiuely, immediately, and particularly prooued out of *Scripture*: but onely by this generalitie, that therefore they may be beleeued, or done; because they are not contrary to *Scripture*, are agreeable to the vncorrupted light of *nature*, or to sundry credible mens *experience*, or are by the *politique lawes* of our countrey, receiued.

[3] T. C.

For who can giue any other sound reason directly drawen from the *Scripture*; that *theft* shall be punished with death: that matters of fact shall bee tried by a *Iurie of twelue*, led sometimes not by *witnesses*, but by circumstances and probable inducements: that the eldest sonne shall haue all his fathers land (by descent) from the rest of his brethren, though they bee neuer so many; who no lesse then the eldest are descending from him: that my kinsman remoued (perhaps fiue or sixe degrees) descending of the whole bloud from my *fathers brother*, shall,

and

and lawfully may inherite my lande, before mine owne fathers ſonne by another wife: that at one and twentie yeeres, a man may effectually ſell his lande, but not the day before, albeit hee haue receiued my money: that *the wrecke of the ſea*, albeit the owner of the goods bee certainely knowen, ſhall bee confiſcated, and belong to the *Prince*: that a *ſtraie* proclaimed (according to lawe) after a yeere and a day, ſhall belong to the lord of the Mannour, where it was taken vp: with infinite ſuch like?

Therefore, it is no good, nor ſafe ground, that the *Innouatours* doe ſtand vpon: when as (being preſſed to take ſuch *oath* according to the lawes of the Realme) they alleage; that in conſcience they may not doe it, becauſe they finde no direct warrant for it by *Scripture*, whereupon to ſtaie their conſciences. For if it were graunted vnto them, that there bee no *commaundements*, no *examples*, no footeſteppes or traces thereof in *Scriptures*: yet if it be not by them prohibited, or condemned, the generall obedience of ſubiects will tie them thereunto.

But I purpoſe alſo (here) to ſhew, the lawfulneſſe of it, euen poſitiuely out of the worde of God. Firſt, declaring that *Magiſtrates* may laie oathes vpon their Subiectes, which are neceſſarilie by them to be taken: Then that they may be tendered and taken in cauſes *criminall* and *penall* to the parties themſelues: and laſtly, I minde in the next chapter (God willing) to anſwere the obiections, that I finde brought to the contrarie.

That when an oathe is duely impoſed, there is a neceſſitie enioyned the ſubiect to take it; doeth appeare by the commandement of *God* himſelfe: *Thou ſhalt feare the Lord thy God, and ſerue him, and ſhalt ſweare by his name.* which words being *diſpoſitiue*, not onely to the maner of the oath, *viz.* *by Gods name*; but alſo to the action it ſelfe of ſwearing: doth argue euidently, that there be oaths, as well *neceſſarie*, as there be *voluntarie*.

The like commandement is giuen by the Lord in the prophet [1] *Ieremie: O Iſrael, thou ſhalt ſweare, The Lord liueth, in trueth, in iudgement, and in righteouſneſſe.* Wherein, there is both a *commandement*, of that action; and an inſtruction, in what ſorte, an *oathe* is to be taken, and with what neceſſarie *adiuncts*, [1] Iere.4.v.2.

In

In the charge that [1] *Iosua* gaue to all the Magistrates of *Israel*; *viz. to their Elders, to their heads, their Iudges, and their Officers*, this (amongst other things) is conteined; that, *they shall not make mention of* [2] *the Gods of other nations, nor shal cause to sweare by them.* And therefore *Magistrates* haue authoritie, to cause (those that be vnder them) to sweare, and to take oaths.

[1] Iosh. 23. v. 2.

[2] Vers. 7.

For an example of such charge giuen, wee haue that of king *Saul*, who not onely [3] *charged the people with an oathe; but made them vowe with a curse, not to eate any food that day till night.* Therefore one of them reported thus to *Ionathan, Sauls* sonne; that *his Father had made the people to sweare.*

[3] 1. Sam. 14. v. 24 & 28.

The most wise king *Salomon*, when he meant (for a punishment) to confine and imprison *Shimei*, within the compasse of *Ierusalem*, for his reuilings of king *Dauid*; telleth what hee did vnto him: *Did I not make thee* (saieth he) *to sweare by the Lord, and protested vnto thee, saying, &c. why then hast thou not kept the oath of the Lord, and the commandement, wherewith I charged thee?* And yet this *oath* and promise was without excepting of any cause (though most important to him, and most necessary,) that might happen, to occasion him to goe out of the Citie: and therefore did bring apparant danger with it, to entangle him as deepe as his life. And albeit the cause which he had of going afterward out of the Citie, might seeme something reasonable, in that *he* [5] *went foorth but to fetch home two of his seruants, that had runne away from him:* yet did this breache of his *oathe*, and of the kings *adiuration* to him, (wherewith hee had charged him) most iustlie cost *Shimei* his life. So king *Saul* [6] vrged *Dauid to sweare vnto him; that he would not destroy his posteritie after him.*

[4] 1. Reg. 2. v. 42. & 43.

[5] Ibid. v. 39. & 40.

[6] 1. Sam. 24. v. 22. 23.

For a priuate offence and iniurie, only betweene neighbour and neighbour, king *Salomon* testifieth; that a necessarie oath of *purgation*, may be required by the [7] complainant: *When a man shall trespasse against his neighbour, and he lay vpon him an oathe to cause him to sweare, and the swearer shall come before thine altar in this house: then heare (O Lorde) in heauen, and do, and iudge thy seruants, that thou condemne the wicked, to bring his way vpon his owne head, and iustifie the righteous, according to his righteousnes.* Where we see, that a *priuate* person vpon a supposed offence, and

[7] 1. Reg. ca. 8. v. 31. & 32.

and *treſpaſſe* agaynſt him; may vrge his aduerſarie vnto a *neceſſarie* oath, albeit the matter be *crimmall*, and penall to him, if either he ſhal refuſe it, or be afterwards otherwiſe conuicted. How much more then may a *Magiſtrate* vrge it, for the publike intereſt, eſpecially for an offence ſuppoſed to be done, againſt the Church or *Common wealth*?

King *Ioſias* alſo meaning to reforme religion, and to reſtore the true worſhip of God, greatly then decayed; did make *a* [1] *couenant and vowe*, and *cauſed all that were found in Ieruſalem and Beniamin to ſtand to it.* [1] 2. Chro. 34. v. 31, & 32.

So [2] *Ezra* the *Scribe* (being alſo a Magiſtrate) *cauſed the chiefe Prieſtes, the Leuites, and all Iſrael, to ſweare; that they would doe according to this worde.* which oathe, that by vertue of his *office*, it was impoſed neceſſarilie vpon them, and not onely *voluntarilie* by them taken; wee haue good teſtimonie, in the wordes [3] next going before: *Riſe* (ſaieth *Sechaniah* vnto *Ezra*) *for this matter belongeth to thee, and we will be with thee, or aſſiſt thee: confirmare, bee thou reſolute, and effect it.* And likewiſe out of the booke of [4] *Eſdras Apocryphall*, where that ſtorie is reported, for it is there ſayd thus: *To thee it doeth appertaine, and we are with thee to make thee ſtrong.* whereupon is added: *And* [5] *hee made them ſweare.* By which wee may gather; that if any of them would not haue ſworne vpon his commaundement; they ſhould haue bene compelled thereunto, by ſome *Ciuill* conſtraint. [2] Ezra. ca. 10. v. 5. [3] Ibid. v. 4. [4] 1. Eſdr. Apocr. ca. 8. v. 92, 93. [5] Ibid. v. 94. 95.

When the richer *Iewes* had receiued the lands of the poorer ſorte to *Morgage*, and they were forfeited vnto them; yea and their very ſonnes and daughters were drawen into bondage, for ſatisfaction of ſuch things, as they had borowed for their neceſſarie ſuſtentation: [6] *Nehemias cauſed the Prieſts to ſweare, to reſtore theſe againe, and to forgiue the hundreth part of the very principall, due vnto them.* So by the premiſſes, we ſee; that *Magiſtrates* may exact *oaths* of thoſe that be vnder them, which ought not to be refuſed. [6] Nehe. 5. v. 11. 12. & 13.

The *Treatiſour* himſelfe will not bee ſtraite with vs in this poynt. for hee yeeldeth that the *Magiſtrate* may *impoſe oaths*, ſo theſe conditions following, be obſerued, *videlicet*, that *either*

the glorie of God bee thereby maintained, or the good of the Common wealth, or of our neighbours furthered: alſo that *it bee not in matters of trifles:* which though it be true, yet he prooueth it, euen triflingly: *becauſe* (ſaieth hee) *de minimis non curat lex*. Likewiſe, that *it bee not ouer frequent:* that, *it bee not touching matters impoſſible or beyond a mans power:* that *the Deponent bee not circumuented with captious queſtions;* and that *it bee not giuen to men of ſuſpected faith, or credite*. which laſt, is neither by any *lawe*, nor *Diuinitie* (that I know of) required: except he thus vnderſtand it; that an oathe is not to bee miniſtred vnto any who is probably ſuſpected to bee likelie, to forſweare himſelfe. For a man may be *ſuſpected*, yea and *diffamed* alſo for *converſation of life*, and yet without iuſt cauſe: yea, and though there bee cauſe of the *fame* and ſuſpicion; yet is it not (in charitie) to be preſumed that euery one, who (through frailtie) hath offended; will therefore forſweare himſelfe, when he ſhall bee put to an oathe.

Theſe afore recited, bee his proofes, and all his premiſſes (taken from *Diuinitie*,) whereupon he buildeth his *frequent* and *vehement concluſions* againſt the oathe which we ſpeake of, to make it contrary vnto Gods worde. which *premiſſes* and *concluſion*, I beleeue, can neuer bee truely drawen together, into a good conſequence; by any ſtrength of mans wit, or by arte of reaſoning. For though theſe *maior propoſitions* may bee ſuch as will be yeelded; yet his *aſſumptions* will alwayes be vntrue, and not to be prooued.

The next poynt to be handled, is, that *oathes* may lawfullie be taken, euen in matters *criminall* and penall to him, that taketh them.

If an oathe muſt be kept, though it be to a mans owne hinderance and damage, then may it alſo be taken. For that which we neede not keepe, and may lawfully breake, was vnlawfull at firſt, to be taken. But ſundrie *oathes* made, though happilie tending to our owne hinderance, muſt be kept; for ſo it is commaunded indefinitely, and indiſtinctly, by God. And it is [1] aſſigned for a ſpeciall marke of a godly man, *to ſweare to his neighbour, and not to diſappoint him, though it be to his owne hinderance.*

[1] Num. 30. v. 3. Pſal. 15. v. 4.

How

How much more then, muſt it be kept, beyng commaunded by a *Magiſtrate*; then when it is made to a priuate perſon onely? and being by vertue of his obedience impoſed, then when it is only *voluntarily* taken? And therefore being to be kept, may alſo (lawfully) be taken.

[1] *Abraham* ſayd thus to his ſeruant, *I will make thee ſweare by the Lord God of the heauens, and of the earth, that thou ſhalt not take a wife vnto my ſonne, of the daughters of the Canaanites.* whereby appeareth, that a *Superiour*, may *cauſe* him, that is vnder him, to *ſweare* to doe his endeuour in a priuate matter appertaining to him. Much more therefore, may a publike *Magiſtrate, cauſe* thoſe that be vnder him, to *ſweare:* touching a matter, wherein the common wealth or Church of God, hath intereſt, to haue it ſincerely delt in. [1] Gen.24.v.3.

When [2] *Eſau* was greatly diſtreſſed by famine, ſo that he was almoſt dead; *Iacob* mooued him to the ſale of his birthright, and tooke an oathe for confirmation of it: and the right continued thereby ratified in *Iacob*. which argueth, that an oath may bee kept, and ſhall ſtand, euen where hee that ſweareth, is thereby greatly endammaged, preiudiced, and ouer-reached, ſo it be not by *fraud* and *mal-engine*. [2] Gen.25.v.33.

We are forbidden *to* [3] *ſpeake vntrueth, or to lie one vnto another,* euen in priuate affaires amongſt our ſelues: and are [4] commanded, not onely *to caſt off lying, but alſo to ſpeake the trueth euerie one to his neighbour, becauſe we are members one of another.* Signifying thereby, that in all matters this is to bee done, where it is expedient for our neighbour, and he hath intereſt, to knowe the very trueth. How much more then, ought we to tell, and manifeſt a trueth, being commanded by a publike *Magiſtrate*, for a common benefite, ſeeing wee are all members of one *Commonwealth*, and of one *Church*; howſoeuer it may turne to our priuate dammage, or of our friends? For if a man bee bound to auouch the trueth (oftentimes) euen with his bloud; howe much more is he to doe it, in his wordes? [3] Col.3.v.9. [4] Ephe.4.v.25.

Where a mā is ſuppoſed to haue borne falſ witnes againſt another, & is thereof brought into queſtiō: ỹ law of God appointeth *the* [5] *men which ſtriue together, to ſtand before the Lord, euē before the* [5] Deut.19.v.17. 18.& 19.

Priests, and the Iudges which shall be in those dayes: and the Iudges shall make diligent inquisition: and if the witnesse be found false, and hath giuen false witnesse against his brother, then shall yee (saieth God) *doe vnto him, as hee had thought to doe vnto his brother.* Nowe, how can this *diligent Inquisition* be made, or the witnesse by any possibilitie, or likelyhood be euer found false, but by *re-examination* of him agayne (as *Daniel* did with the two *Elders*) touching euery circumstance, for the boulting foorth of the trueth? For it cannot bee imagined that moe good witnesses may be had in euery matter of *periurie*, that are able to depose in the flatte contrarie. But because the matter is *criminall* to condemne him of *periurie* and very penall (euen as deepe as the punishment of the other should haue bene, if the matter had bene found true,) which may happen to bee *capitall:* It will (perhaps therefore) be sayde, that the supposed false witnesse, may not be vrged to answere his *reexamination*, vpon his oathe. But the very like reason and allegation may be made, that hee may not bee vrged to answere either yea, or nay, to any question at all thereabouts. For if the question demaunded bee true, it is no more lawfull for him in the sight of God to denie it without *oath*, then it is with an *oath*. And so could there bee no likelyhood of any possible meanes, euer to finde out a false witnesse. and then that lawe of God should serue to none vse; which were absurd and impious to imagine. And what cause, (I pray) haue the *Iudges* of that *Inquisition* to beleeue him vpon his owne bare word, (if he list to answere at all, which is to doe more, then by the *Innouators* is thought needfull) whose very *oath*, they haue iust occasion to suspect, and doe therefore make *Inquisition* against the trueth of his former *oath?* So that hereof it must needs (by due consequence of reason) be gathered; that it may happen, a man may bee *examined* vpon his oathe, in a matter *criminall*, of his owne *turpitude*, and very *penall* to himselfe, and that iustly.

There seemeth to me a very direct and playne place in the *Prouerbs* of *Salomon*; for proofe, that an *adiuration* & *curse* made but indefinitely, & generally against any whosoeuer, that had cōmitted an offence: did before God, bind ỹ offender (for auoiding

of

of ſinne) to reueale ỹ matter, though it concerned, euen his owne turpitude. *He* [1] *that is partener with a thiefe* (ſaith Salomon) *hateth his owne ſoule; he heareth curſing, and declareth it not. To be partner with a thiefe, is* (no doubt) *a filthie crime.* and ſuch a man cannot be aptly ſayde, to *hate his owne ſoule*, vnleſſe the fault it ſelfe were a grieuous ſinne. The reaſon, why ſuch one is noted by the *holy Ghoſt* ſo grieuouſly to ſinne, as that he is thereby accounted an enemie to his *owne ſoule*, is; becauſe he *heareth curſing*, and *reuealeth not the theft*, wherein he is *partaker*. It reſteth then onely to knowe, what *that curſing* is, which in this place is meant. The *Hebrewe* interpreters (as I haue learned of thoſe, who bee very ſkilfull, and conuerſant in them) doe expound it of *that curſe with adiuration*; which the *Prieſtes* vſually gaue againſt any, whoſoeuer had done or knowen of ſome certaine offence, which was committed; if they would not reueale, who were the offendors. whereupon doth followe, that euen the *partner with a thiefe*, vpon ſuch a generall and indefinite *curſe*; was bounde in conſcience, to reueale the theft; though it touched, both anothers, and alſo his owne *ſhame*, and *diſhoneſtie*: and albeit hee was not called into queſtion, nor (perhaps) had in any ſuſpition thereof. Then how much more, when *Gods Prieſt*, or the Iudge (who is *Gods Lieutenant*) vpon probable groundes and inducements afore diſcouered to him, doth charge a ſingular perſon with ſuch a crime, is hee bounde before God, to reueile the whole trueth?

[1] Prou. 29. V. 24.

This kinde of *Adiuration with curſe*, to the intent to haue reuealed, by whom goods were ſtollen; was alſo in vſe, amongs priuate perſons in the people of God: and they had a conſcience (being but charged indefinitely amongs others, without any diſcouerie or cauſe of ſuſpition againſt any of them in particular) not to conceale the theft: as [2] appeareth, by the hiſtorie of *Michah*, and his mother. for that which the *latin interpreter* there, readeth thus: *quos ſeparaueras*: *Arias* [3] *Montanus*, by the *Hebrewe*, *Chaldee*, and *Greeke* copies, prooueth; that it ought to bee expounded in this ſort, viz. *quos furto amiſeras*, viz. the 1100. ſicles, or halfe ounces, which were *ſtollen from thee*, and for which thou did curſe,

[2] Iudic. 17. ver. 1, 2, 3.

[3] Montan. ibid. in lib. de varia Republica.

or adiure (ſaith *Michah* her ſonne) I haue them. Furthermore
1 1. Cor. 10. v. 31. wee are [1] bounde to *doe all to the glorie of God*; but it belongeth to the *glorie of God*, for a man (by due preſumptions burdened with a crime, and charged by the Magiſtrate) to confeſſe of himſelfe, as appeareth by the hiſtorie of *Achan*. For, albeit the lotte fell vpon him; yet was this nothing but an inducement to ground a *ſpeciall Inquiſition* againſt him, being ſo detected vpon the *generall Inquirie*. For if hereupon onely, he might haue bene executed (becauſe the diſcouerie by lotte, was by *diuine prouidence*, directed to fall vpon him) then *Ioſhua* needed not to haue required any further confeſſion of him. Yet he doth not reſt in that detection, but goeth further with a moſt
2 Leuit. 5. ver. 1. *ſolemne adiuration* (in thoſe dayes vſed for [2] an oath; the Hebrew word ſignifying both, and being tranſlated ſometimes *in-*
3 Ioſh. 7. ver. 19. *ramentum*, and ſometimes *adiuratio*) in this [3] maner: *Sonne, giue glory to the Lord God of Iſrael, and make confeſſion vnto him, & ſhew me now, what thou haſt done.* vrging him vpon this *generall detection* by lot; to a particular *confeſſion* of the *hidden crime*, and the circumſtances thereof; albeit the puniſhment of it was *capitall*. In which hiſtorie we finde; firſt a feare conceiued by *Ioſhua*: but at large, vpon the badde ſucceſſe they had in battell; that it was likely, God was offended with them: then a care in him to enter into a *general enquirie*, for the finding out of ſome probable and preſumptiue matter of inducement, againſt particular perſons, who were likely, to be the offendors, that had ſtollen ſomething which was accurſed, and for which God was ſo diſpleaſed. therefore, according to the direction giuen by God himſelfe, and the cuſtome of thoſe times, when as God did more *miraculouſly*, and *extraordinarily* worke among his people; knowing, that albeit the *lots were caſt* confuſedly together *into the lappe*; yet *God* by his wonderfull prouidence *diſpoſeth of them*, as to his owne diuine wiſdome ſeemeth beſt; he followed that courſe in his *generall Enquirie, of caſting lottes*. A *generall Enquirie*, I call it, becauſe, albeit it was moſt probable, ſome heynous offence to haue bene committed amongſt them; yet was it not knowen (till God himſelfe reuealed it) what kinde of crime it was, nor who was likely to be the committer of it. But after the lot was fallen vpon *Achan*, whereby a ſufficient inducement

was

was giuen to proceede *ſpecially* againſt him: *Ioſhua* then entred into a *ſpeciall Enquirie*; by examining and charging him, as he tendered the glorie of God, to tell the whole trueth, *what he had done*. For as yet, albeit by the lot fallen vpon him, there was good probabilitie againſt him, to bee that grieuous offender: neuertheleſſe *Ioſhua* had no coniecture, what the very particular thing was, which he had ſtollen, nor whether he had any partners, nor yet knewe hee any other circumſtances of *place*, *time*, &c. ſo that this ſecond *Inquirie* was *ſpeciall* in reſpect of the perſon, but (in ſome ſorte) *generall* in reſpect of the maner of the fault. which conſideration greatly fortifieth our cauſe in handling: wherein, after good *inducements* found, theſe *Enquiries* are *ſpeciall* both for *perſon*, and for *particularitie* of *crime*.

Whereby, is alſo argued *a fortiori*, that whereas by *fame*, or other good *preſumptions* and *euidence*; a man is detected of crimes moſt *ſecret* afore: there the *Magiſtrate* may exact the parties owne *confeſſion*: eſpecially if it be not ſo penall, as either *life* or *limme*, which this of *Achan*, was. Next may bee gathered, that to confeſſe vnto a *Magiſtrate* duely charging a man, is to confeſſe vnto God: thirdly, that to make ſuch *confeſſion* to *God*, is to *glorifie him*: And laſtly, that in like caſes, the partie is bound to diſcloſe the particular circumſtances, though perhaps he be not ſeuerally and in particular interrogated of euery one: for it is there ſayd, *ſhew me now what thou haſt done*. Whereupon *Achan* being touched in conſcience, & knowing his duetie to the *Magiſtrate*; confeſſed his fault, with all the particularities thereof. If this were done vpon his oath (as many learned interpreters do hold) then may an oath be vrged in a matter *criminall*, and moſt penall to the partie. If he thus confeſſed, and was bound ſo to doe, though it were without *oath*: then howe much more, when the partie is tied by an *oath*, giuen by the *Magiſtrate*, as it is prooued, it may be lawfully.

And albeit the *Treatiſour* himſelfe confeſſe the effect of that which we haue gathered touching this *Hiſtorie*: yet he ſaith, *the Magiſtrates charge vnto him; that (remembring the glorie of God) he ſhould confeſſe the trueth: is none oath. For it were a hard concluſion* (ſaith he) *to gather, that hee is periured, who being ſo*

charged, confeſſeth not the trueth. For anſwere whereof, if being ſo charged, the partie anſwere not at all, then incurreth he wilfull diſobedience; which is no leſſe a crime then *Periurie* and is (thereby) alſo, to be conuicted. But if he anſwere vntruely; then falleth he into another grieuous ſinne. for (as it reſteth hereafter to be ſhewed) it is no more lawfull or tolerable, to lie vnto *Gods Magiſtrate*; then it is to ſweare falſly afore him. And if this were an *Adiuration* (as himſelfe ſeemeth to encline) and were lawfully done of *Ioſhua*: then by the charge of an *oath* was *Achan* bound, to diſcouer the whole trueth, for ſo wee reade in the place of *Ezra* afore alledged, according to *Iunius* and *Tremellius* tranſlation: *hee* [1] *adiured the chiefe Prieſtes, Leuites, and all Iſraell, that they ſhoulde doe according to that poynt, and they ſware.* Whereas *Caluin*, by the forme of thoſe conceiued wordes, which were vſed in other oathes, amongs the people of God, gathereth in his *Inſtitutions*, that *Achan* there tooke an oath: the *Treatiſour* neuertheleſſe, to confute *that excellent, and learned light of Gods Church* (for ſo he calleth him) writeth thus, viz. *though that forme of wordes, giue glory to God &c. were vſed in oathes: yet it followeth not, that whereſoeuer it was vſed, that was an oath.* In deede it muſt be confeſſed, that it followeth not *ex ipſa vi conſequentiæ:* but by reaſon of the matter, for that theſe, or ſuch like were the *conceiued*, or ſette wordes of *ſolemne* oathes amongs the people of God: And becauſe in this action, being for finding out of a trueth (otherwiſe kept ſecret) it was neceſſary to be done as ſincerely, as mought be: therefore the argument of *Caluin* is very probable, to proue that it was done by his oath. But the *Treatiſour* ſeemeth alſo to admit it, and herein to let this holde goe: and withall little leſſe, then to yeelde vp the whole cauſe. *For an offence being made knowen, which is dangerous to the ſtate, & the partie being found by due, and lawfull triall: if after* (ſaith he) *theſe rigorous exacters in ſo milde, & courteous maner, in the name of God ſhall entreate, or (if they thinke good) depoſe him to reueale the trueth in particular* (he meaneth, giue him an oath to that effect) *no man (I ſuppoſe) would finde himſelfe grieued, with their proceedings.* Wherby, ſauing, that he here ſeemeth to ſuppoſe the falling of the lot vpon *Achan*, to be a *triall* and a full and ſufficient conuiction of it ſelfe: he doth

[1] Ezra 10. V. 5.

in

in theſe wordes, as plainely eſtabliſh the *oathes* that we defend, as may be. But when a *tryall*, and full conuiction is already made; to what purpoſe, (other then to feede the hearers curioſitie) were it; to miniſter an oath to the partie condemned, (eſpecially hauing no complices more then in this caſe) that he ſhall vnfolde & recount vp euery particular circumſtance, of the crime that was by him committed. But if by thoſe his wordes, *of due and lawfull tryall*, he meanes nothing els but ſome lawfull diſcouerie, opening way, and occaſioning the *Iudge*, to enter into the parties *ſpeciall examination by oath*: then is hee come home iumpe vnto them, whome hee ſo vehemently ſhaked vp afore.

When a man is [1] found ſecretly murthered in the fielde, and the *murtherer* is not knowen, nor ſuſpected: God appointed in his Lawe, that all the *Elders* of the next Citie thereunto, ſhould vſe certaine ceremonies before the *Prieſts* (by whoſe [2] appointment, eche controuerſie of blood, and of wound was determined) and then *ſweare*, according to this conceiued forme of wordes, viz. [3] *our hands haue not ſhedde this blood, neither our eyes haue ſeene him who ſhed it*: that is, none of vs (euery man ſwearing ſeuerally for himſelfe) haue done it, nor any of vs knowe, who is the murtherer. Where we ſee, there was none other *detection*, nor cauſe of *preſumption*, but the onely vicinage, and neerenes of place. yet euen hereupon, the wiſedome of God thought good to preſſe them of the next Citie, with this *neceſſary oath*, partly of *purgation*, and partly of *Enquirie*, euen in a crime *capitall*. For if any of thoſe *Elders* were the murtherer, or were an acceſſary thereunto: was hee not thereby driuen, either to damne his ſoule by *periurie*: or els to reueale his owne ſhame, to the loſſe, not of his *honeſtie* onely, but alſo of his life? If this being Gods owne lawe, be but equall, then howe can the exacting, of parties oathes, being vpon farre more probable, and ſtrong preſumptions detected, and called in queſtion, and that for crimes not tending to any mutilation of limme, and much leſſe *capitall*: be thus abſolutely challenged for *tyrannicall*, or *vnequall*; as they be by ſome, nowe of late times?

[1] Deut. 21. v. 1. vſque ad 9.

[2] Ibid. ver. 5.

[3] Ibid. ver. 7.

But this argument of ours, the *Treatiſour* goeth about to anſwer by a very ſtrange queſtion, viz. *where is* (ſayth he) *oath (in*

this caſe) giuen to any particular perſon? as if that oathe, which were lawfull to be impoſed vpon many for one matter; were not alſo lawfull to be giuen vnto one alone, where he onely is ſuſpected thereof? Where there be many ſeuerall perſons, there muſt needes be ſome *particular perſons*, I thinke. Wel, he will then (belike) allowe this oathe to be giuen, ſo there be many defendants in one cauſe. *But* (ſaith he further) *where is oathe to anſwere Interrogatories vpon vnknowen, ſecrete, or barely ſuſpected matter? for the felonie is apparant, the offendor onely lyeth hidden: whereas the Inquiſitors ex officio haue the man afore them, whome they will examine; but the matter (for the moſt part) is ſecret*, &c. *and many times but a fame of a crime neuer committed*. As if this difference (though it were, as it is not generall) could make any diuerſitie for prouing a lawfulnes in the one, & an vnlawfulnes in the other? This therefore falleth vnder that head of his *Sophiſticall* deuiſe of ſuch differences, as touch not the very point in controuerſie. Beſides, there be *Enquiries* of office (which abſolutely he impugneth) ſome, aſwell where the offendor vnknowen, is *enquired* of in reſpect of the *apparant crime*; as for example in *Forgerie*, *Libelling*, *Murder*, &c. as there be, when the *Crime* (being but *preſumptiue*) *is enquired of*; and the perſon ſuſpected, is apparant, as in *adulterie*. Hath not the *treatiſour* learned to note the differēce which is, betwixt *Crimina tranſeuntia*, *viz.* where no traces of the crime doe remaine after the facte, as of *ſecret conſpiracies*, *ſeditions wordes*, and adulteries, &c? and ſuch crimes, as be *Permanentia*, viz. where ſome euidence of the crime committed, doth ſtil remaine and continue; as in *Murder*, *Forgerie*, *lybelling*, *&c?* and yet ỹ *inquirie* by the parties examination vpon his oathe (ſo it be neither *Capital*, nor for *Mutilatiō*) is no leſſe lawful and neceſſarie in the one, then it is in the other.

[1] Leuit.5.v.1. In [1] *Leuiticus*, a ſacrifice is appointed to be made for certaine ſinnes, amongſt which this is one, according as *Arias Montanus* doeth tranſlate it forth of the Hebrew. *And if a ſoule, or a man ſhall haue ſinned, and haue heard the voyce of an Adiuration or oathe, and he a witneſſe either hath ſeene it, or doeth knowe it: if he doe not reueale it, he ſhall beare his owne iniquitie.* That which is here ſaid; *If he haue heard the voyce of an oathe*, the *Geneua tranſlation* vttereth thus in the Margent, (as if it were neerer to the

Hebrewe

Hebrewe then the other in that text) viz. *If the Iudge hath taken an oathe of any other.* If this then be the meaning, we are hereby bound to reueale what we haue *ſeene*, or *knowen* touching that; which the *Iudge* ſeeketh to finde out, by another mans *Oathe*: yea, though we be not at all preſſed therein; much more ought we then to tel what we *knowe* or haue *ſeene*, touching the matter; when we our ſelues are particularly ſo cõmanded by the *Iudge*.

Saint [1] *Anguſtine* expoundeth it of this caſe, viz. where a man heareth another ſweare, and depoſe falſely. *For* (ſaith he) *this, that place ſeemeth to ſaye, that a man ſinneth, who heareth another ſweare ſomething, that he knowes to be falſe, if he hold his peace. But he is then ſaid to knowe, either when he is a witneſſe of the matter depoſed of, or did ſee it, or was priuie to it, that is, did by any meanes knowe it, as either by ſeeing it, or by hearing him ſpeake of it, that now ſweareth otherwiſe.* So that he leaueth it at large, to extend to *Oathes* (falſely) taken, either before a *Magiſtrate*; or priuately, or how elſe ſoeuer.

1 Aug. in quæſt. Leuit. ad ca. 5. quæſt. 1.

Iunius in his ſecond edition of *Annotations* vpon this chapter, reſtraineth it onely vnto ſuch vaine, and raſhe oathes, as men ſweare *extraiudicially*: making him that heareth another to ſweare (without reprehending him) to be guiltie of ſinne himſelfe, as no doubt he is. But ſurely this interpretation of his, cannot be grounded vpon this place: at leaſt the place cannot (by any meanes) be onely reſtrained vnto this caſe. For the *matter* concerning which a man *heareth* another ſweare, is the thing (here) principally conſiderable; and not the very *Oathe* it ſelfe: becauſe it is not onely ſaid: *If a man heare the voyce of an oathe:* but it is alſo added (as moſt materiall) *& ipſe teſtis vidit, & ſcinit, which matter he, as a witneſſe hath ſeene, or otherwiſe, by ſome meanes hath knowledge of; if he ſhall not declare it, or reueale it, he ſhall beare his owne iniquitie and ſinne.* Therefore it is the *matter* which the by-ſtander is able to witneſſe of (by reaſon of his *ſight*, or ſome other meanes of *knowing* it) that (for the auoyding of ſinne) muſt be declared.

Againe, if it were onely meant of him, that heareth another *blaſpheme*, or *vainely*, and *falſely*, *ſweare*, and doeth not reprehend, and rebuke him for it: then could not the verbe of *Declaring* haue bene vſed, but rather ſome worde of rebuke, or repre-

henſion. Thirdly, if it were meant onely of the *Act of ſwearing* that is not rebuked; then needed no mention to haue bene made, of any other *ſenſe*, but of *hearing* onely. But we ſee, that there is mentioned *ſeeing*; and alſo (with a *diſiunctiue*) any other meanes of *knowing* it, beſides hearing of the oath: and therefore, that meaning which *Iunius* giueth thereof, cannot (poſſibly) be the very true ſenſe of this place. Nay *Iunius* himſelfe in his firſt *Annotations*, confeſſeth the moſt to holde, that it ought to be vnderſtood thus: viz. that he ſinneth, who heareth an *oath* giuen to another man touching any matter, whereof he hath knowledge; if hee doe not therein diſcloſe what he knoweth. So that whether the other depoſe *vainely*, *falſely*, or not, is not here ſpoken of, or to be attended: but whether a man conceale his knowledge of a matter in queſtion, that is conuenient to be knowen vnto a *Iudge*. for it is he, that hath authoritie to vſe the *voyce of an oath*, or of that *adiuration* or charge vnto another, which is here ſpoken of.

By this ſenſe hereof, giuen by the moſt, and flowing eaſily from the very wordes themſelues, may be gathered; that an oath may be giuen to the partie enquired of *indefinitely*, as the *Iudge* (according to lawe) ſhall thinke good to proceede, euen before any witneſſes bee produced againſt the partie: that this voyce of an *oath* and charge to ſweare, may be giuen; before it be knowen whether any, or what witneſſes can teſtifie therein: and that a man knowing the trueth touching a matter whereof another is *enquired* of by *oath*, ought (for auoyding of ſinne) to teſtifie, and to *declare* his knowledge therein.

Yet becauſe in that place, no mention is (expreſſely) made, of any other perſon but of him, that *heareth ſuch oath*, who alſo *hath ſeene* or *knowen* ſomething, and who is to *declare and reueale it*, or elſe to *beare his owne ſinne*: therefore it is alſo (very probably) by ſome taken to haue place, when a mans owne ſelfe is *adiured* or charged by the *Magiſtrate*, to take oath. For the perſon of the *Magiſtrate*, or ſome other muſt needes be vnderſtoode beſides, though none be expreſſed; becauſe it is ſayde: *If a man haue heard the voyce of an oath*, whereby ſome other perſon, then the hearer himſelfe, is neceſſarily implied. For albeit the *Hebrew* interpreters do vnderſtand it of that

adiuration

adiuration with *curſe*, which was done by the *Prieſt*: whereby he (vſually) curſed any whoſoeuer had committed ſome particular apparant crime, though the perſon were vnknowen & vnſuſpected, if they would not reueale it, according to the place afore alledged, out of the 29. Chapter of the *Prouerbs*: yet the *Chaldee Paraphraſte*, that writ in, or before *Chriſts* time, and of all Interpreters is of higheſt and moſt vncontrolled authoritie, vnderſtandeth it of the *Iudge*, and reades it thus, viz. *the voyce of Adiuration or Execration* made by the *Iudge*.

And then out of both theſe Interpretations doth follow: that (without ſinne) a man cannot but *teſtifie*, both againſt another *enquired* of; for it is ſaid, *whether he haue ſeene:* & alſo againſt *himſelfe* (if it be required) for it is ſaid, *or haue knowen of it*, which may as properly be referred to a mans own fact, as to any other mans: & the rather to his owne; becauſe, a man is leaſt ignorant of his owne facts. And vpon this latter acception of the place, it doth follow; that a *Iudge*, and *Magiſtrate* may lawfully tender & vrge ſuch *oathe*, and a ſubiect ought not to refuſe it: becauſe *hee ſhall beare his owne ſinne*, for *hearing the voice of an oath giuen*, and for *not reuealing his knowledge* in that matter.

When a man doth deliuer money or ſtuffe, of truſt, [1] *to be kept by his neighbour*; if it happen to be embezelled away, and therefore thought to be ſtollen, *if the thiefe be not certainely knowen, or found*: he, to whom they were ſo deliuered *in depoſito*, though he had nothing for his paines, nor there be any *preſumptions* againſt him, that he hath withdrawen it: yet (by the lawe of God) muſt take a *neceſſarie oath*, of *purgation* and *Enquirie* (vpon the other mans onely *ſuſpition*) *before the Iudges*; not onely, that it is *ſtollen* (which might iuſtly perhaps be doubted) but alſo, *whether he* himſelfe hath *put his hand*; that is by any direct, or indirect meanes haue fraudulently dealt, *touching his neighbours ſaid goodes, or no?* [1] Exod. 22. V. 7. & 8.

The ſame is alſo a little after eſtabliſhed by God, touching any [2] quicke goods, happening to be left *in depoſito*: For *if a man deliuer vnto his neighbour to keepe; aſſe, oxe, ſheepe, or any other beaſt, and it die, or be hurt, or be taken away by enemies, and no man ſee it: An oathe of the Lord ſhall be betweene them twaine, that hee hath not put his hand vnto his neighbours goodes, and the owner of it ſhall take the oathe, and he ſhall not make it good*. where appeareth, [2] Ibid. V. 10. & 11.

that vpon the *mutuall ſuſpition* onely, of the one againſt the other, both the *parties* are to take ſuch oathe, which, though it doe tende to the diſcouerie of a mans owne *ſhame*, *diſhoneſtie*, *fraude* and *dammage* (if hee happen to bee guiltie) yet is hee of neceſſitie to take it, or elſe to bee holden *pro confeſſo & conuicto*; and is ſo well allowed alſo to bee giuen by the Iudges, and to be taken by the *parties*; that it is there called, *an oath of the Lord.*

Nowe that hee muſt neceſſarily take ſuch *oathe*, though the cauſe bee *criminall*, ſo that hee muſt eyther diſcouer his owne turpitude, bee ſinnefully forſworne (if hee bee indeede guiltie thereof) or elſe bee conuicted as guiltie for his contumacie; doeth very plainely [1] appeare by *Leuiticus*: where *a ſacrifice of attonement* for ſuch a ſinne of *periurie* is preſcribed, beſides ſatisfaction vnto the partie wronged. *If any doe ſinne* (ſaieth the Lorde) *and denie vnto his neighbour that which was taken him to keepe, or that which was put to him of truſt, or doth by robberie or by violence oppreſſe his neighbour, or hath founde that which was loſt, and denyeth it, and ſweareth falſely: for any of theſe things that a man doeth, wherein hee ſinneth: when (I ſay) hee thus ſinneth and treſpaſſeth, hee ſhall then reſtore the robbery, &c.* So that hereby is manifeſt, that in ſundrie *criminall* matters, euen of a mans owne turpitude ſuch as bee *prohibita quia mala*, hee may bee vrged to a *neceſſarie oathe*, and namely touching his deteining (with deniall) of goodes left (vpon truſt) with him: alſo touching *robberie*, *violence*, and *oppreſſion* by him ſuppoſed to be committed againſt his neighbour. But there coulde neuer be any poſſibilitie in a matter ſecretly carried, either of bewraying a mans ſelfe to his owne *ſhame*, *loſſe*, or elſe *forſwearing* himſelfe, as is noted by this place; if he might ſafely, nay if he were bound in conſcience to do (as theſe *Innouators* now pretend, and practiſe) viz. to refuſe to anſwere directly, and particularly, to any of theſe crimes that bee asked of him, with *oath*, or without his *oath*, but might lawfully put it ouer to bee prooued onely by witneſſes. and then were it wholly in vaine to appoint *ſacrifice for a ſinne*: into the danger of which ſinne a man coulde not poſſibly fall, except he would firſt commit another ſinne.

[1] Leuit. 6. ver. 2, 3, 4 & 5.

Seeing

Seeing then by the equitie of Gods owne *Iudiciall* Lawe, in a matter *criminall*, and of a mans owne turpitude, he may be *examined*, and muſt *neceſſarily* anſwere by *oathe*, or elſe ſhall be holden conuicted, euen vpon a priuate mans ſuſpition alone, ſeeking therein but his owne particular intereſt and ſatisfaction: how much rather vpon ſound, and good *detections*, and *preſumptions*, may this be vrged by a *Magiſtrate*, and ought not to be denyed by the ſubiect, where a common good to an whole *Chriſtian* ſtate is ſought, and the parties owne *reformation*, by due correction and puniſhment, concurring beſides, with the lawes of the Lande, that requireth this parte of obedience in all ſubiects?

This *Iudiciall*, and *deciſorie oathe* heere ſpoken of, the *Treatiſour* calleth a *publike oathe*, in reſpect (as it ſeemeth) it is *openly*, and *Iudicially* giuen before the *Magiſtrate*; and confeſſeth it to bee *neceſſarie*: notwithſtanding it bee but touching a priuate matter of goodes, betwixt partie and partie. and therefore *à minori ad maius*: or (as Lawyers ſpeake) *à fortiori*, it muſt needes bee more *neceſſarie* for a *publike crime*, then for a *priuate treſpaſſe*; becauſe the poiſon and malignity of the *publike*, may preiudice, and plague the whole *common weale*: if not alwayes directlie, yet by the lewdneſſe of the *example*, and may giue cauſe of offence vnto the well diſpoſed.

If a man[1] *be mooued with a iealous minde*, or (as the *Hebrewe* vttereth it) *if the ſpirite of Iealouſie come vpon him, ſo that hee is iealous of his wife, that (perhapper) is defiled: or if hee haue a iealous minde, ſo that hee is iealous ouer his wife which is not defiled, and ſo the matter doubtfull:* [2] *then the Lorde in ſuch caſe appointeth, that the man ſhall bring his wife to the Prieſt, &c. and the Prieſt ſhall charge her by an oathe, and ſay vnto the woman: If no man hath lyen with thee, neyther thou haſt turned to vncleanneſſe from thine husbande, be free from this bitter and curſſed water. But if thou haſt turned from thine husbande, and ſo thou arte defiled, and ſome man hath lien with thee beſides thine husbande, (then the Prieſt ſhall charge the woman with an Oathe of curſing) and hee ſhall ſaie vnto her: The Lorde make thee to bee accurſed, and deteſtable for the oathe, among thy people, and*

[1] Num. 5. ver. 14.

[2] Ibid. verſ. 13. Ibid. verſ. 15. Ibid. verſ. 19. 20, 21 & 22.

and the Lorde cauſe thy thigh to rotte, and thy bellie to ſwell: and that this curſed water may goe into thy bowels, to cauſe thy belly to ſwell, and thy thigh to rotte: then the woman ſhall anſwere, Amen, Amen.

In which courſe of proceeding, I obſerue to the purpoſe in handling, that this ſtraite *Enquirie* moſt dangerous to the bodie and ſoule of the woman, if ſhee ſweare falſely: is grounded onely vpon the *iealous ſuſpition* of her husband: that it is in a *crime capitall* to her, if ſhe be guiltie, and ſhall chooſe to confeſſe it; rather then to *forſweare* her ſelfe (with hazard of ſoule, and of a moſt loathſome diſeaſe of the bodie) for an *adultreſſe* (by the ſame lawe) was to be ſtoned to death: and that it is of great turpitude vnto her, and is *prohibitum quia malum*: and laſtly, that it is in a hidden, and ſecret crime euen *in theſi*, of his owne nature, and in generall, For the ſlender remnants of honeſt, and vnhoneſt, left euen to the very reprobate, euer ſince the fall of our firſt parent, doth remooue this action (euen where it may be lawfully committed) from the ſight, and knowledge of others, ſo much as may be.

[1] Ibid. V. 13.

And in this[1] place, it is hidden and ſecret *ex ipſa hypotheſi*: becauſe the caſe is put, that there *neither bee witnes, nor ſhee taken with the manner*, and yet the husband hath her in *iealouſie*. So that if God (in his diuine wiſedome) found it equall and iuſt, for ſatisfaction onely of the ſtrange humour of *iealouſie*, not onelie (vpon paine of *conuiction*) to make her vndertake ſo perillous a kind of *purgation*, but alſo to charge her by an *oathe*, and a moſt ſolemne *curſe*, to declare the trueth in a *crime* of this quality, and conſequence to her life: howe can the wiſedome of thoſe, that chalenge *oaths* of farre more apparant mildenes in diuers points noted, ſtand ſo oppoſite to the wiſedome of an whole Realme for many ages together: and being ſo ſtrongly warranted by the wiſedome of God, both in this, and the *former Iudicialles*, ſeruing for the gouernance of his owne *peculiar* people?

In anſwere of this example out of Gods lawe, the *Treatiſour* ſaieth, that *the woman is not heere called for ex officio: but vpon the complaint of her huſband*. But if it be conuenient and equall, vpon that moſt ſlender ground of *iealouſie*, and vpon the husbandes *ſuſpicious denunciation*, who perhappes is weary of his wife, and mindeth

mindeth to put her away, if his iealous humor in that behalfe, be not ſatisfied: how much more then is it equall and iuſt vpon the Iudges *office* to be done, who is no way priuatly intereſſed, & for the ſatisfaction or preſeruation of the *church*, or common weale, to remoue a common ſcandall and offence, by the parties clearing, or by his puniſhment? The conſequence of this mine argument to be good, for proofe of a farre greater equitie, in the one then in the other, viz. rather to miniſter ſuch oathe *of office*, then vpon an *Accuſers complaint*, the lawes, both *Ciuil* and *Canon*, and the cuſtomes of all nations abroade, doe warrant vnto vs. all which, doe permit an *oathe* touching a *crime*, to be miniſtred vnto the defendant *ex officio Iudicis*, and yet they all doe denie it vpon an *accuſation*, or vpon a complaint made by a voluntarie and priuate partie. And therefore this difference by him taken is ſuch, as maketh flat againſt him: without working of anie diuerſitie, to inferre an equitie in the one, and an vniuſtice in the other, as is pretended. therefore vntruely, and vainely doeth hee ſurmiſe, that out of this example we wil conclude, that *euery Iudge Eccleſiaſticall, to ſatisfie his iealous ſuſpition of any crime, may appoſe by oathe, and compell men to their purgation:* a matter repugnant vnto reaſon, vnto lawe, and vnto all practiſe. For no mans onlie *bare ſuſpition*, beſides an *huſbands*; can (by any equity) worke an intereſt to driue an other to *purgation* of ſuch a *crime*, by his, or her *oathe*.

The examples alſo of godly men reported in *Scriptures*, doe ſufficiently condemne the froward diſobedience of refuſers of ſuch oathes, in theſe dayes. For they being asked (ſometimes) particular *queſtions* dangerous to thẽſelues (if they had not ſtood cleare) and, ſometimes charged (euen but in *generalitie*) to anſwer what ſhould be demanded of them, they vſed not any ſuch friuolous *tergiuerſations*, and *euaſions*, as this ſorte of people, and as *Seminarie Prieſtes* doe. that is to ſay; *Let me knowe euery point afore, that you will aske me, and then I will tell you what I will doe: or I will anſwere ſo far as I am bound by law, and by a good conſcience*, whereof (by your leaue) I my ſelfe will be Iudge. *or I will not ſweare to accuſe my ſelfe, or my brother, for that is contrarie to charitie: or where be mine accuſers, let thẽ ſtand forth?* or *if you haue any thing againſt me, proue it by witneſſes:* with ſuch like a number.

[1] Ierem.38. vers. 14,15.

For when the *Prophet Ieremy*[1] was charged by the *King* in a *generalitie*, to answere that which hee woulde aske him; hee stoode not vpon refusall, till hee might knowe what it was, but made this doubt onely, whether if hee tolde trueth, the *King* woulde not kill him. which when the *King* had promised hee woulde not, then *Ieremy* condescended to answere what hee woulde demaunde of him. signifying thereby to vs, that being asked by a *Magistrate*, if it were not a matter *capitall* vnto him, hee ought, and woulde discouer it. If this were done vpon an *oathe*, then must wee doe the like, in the like case also. If hee did yeelde to answere vnto *Interrogatories* vncertaine, and vnknowen vnto him both in generalitie, and also in particularitie, and yet thought himselfe bounde to saie the trueth without oath: then much the rather would hee haue done it vnto those, whereof the qualitie he should haue knowen afore hand; but especially vpon his oath. And so ought wee, being so deepely charged. Yet these questions so generally to be propounded vnto him, might haue beene of matters, both *criminall* and very *penall* vnto himselfe, and vnto others also.

[2] Ierem.37. vers. 13.& 14.

When the same[2] Prophet was charged, with *a particular crime*, of intended defection and fleeing to the *Chaldeans*, by *Iriah a chiefe officer*, sitting Iudicially *in the gate of Beniamin*: hee did not refuse directly to answere, by putting him off to prooue it by *witnesses*, or by anie such like *dilatorie*: but answereth roundely, and truely, in the very *contradictorie* (as it were ioyning issue with him) and sayeth: *That is false, I flie not to the Chaldeans*. Nowe, if the *Prophet* had beene guiltie, woulde hee haue falsely denied it, or haue made anie shiftes to auoyde it, thinke yee? or woulde hee say vntruely, being vnsworne, more then being sworne? I thinke no man will so imagine of the *holie Prophet*, and therefore (by this example) a *Magistrate* in authoritie or a superiour, must bee directly dealt with, in questions pertinent, that he shall aske; whether vpon *oathe*, or without *oathe*; so farre as godlie Lawes doe require, albeit the matter be *criminall*, (as it was in this case) vnto the partie *Interrogated*.

[3] 2.Reg.ca.5.

When[3] *Elisha* the Prophet (vpon none other detection but *diuine*

diuine reuelation) entred to the examination of *Gehazi* his ſeruant, touching a *criminall* matter; and that without any *accuſer formall*, or *repreſentatiue*, beſides himſelfe: did hee not require an anſwere of him; and was not the ſeruant (before God) bound to anſwere him, and that truely? If heere it bee ſaide, that he miniſtred none oathe vnto him, it is true: yet was it no more lawfull for *Gehazi* being his ſeruant, and vnder his authoritie, to deny it by falſehoode, (as hee did) or to haue anſwered not directly, or elſe nothing at all; then it would haue bene for him, to haue flatly forſworne it. So that euery one in authoritie, that requireth an anſwere of a guiltie perſon (being vnder his power) in a matter of *crime*: muſt needes either driue him to *a lie, which* [1] *ſlayeth the ſoule*; or elſe to *accuſe himſelfe* of a matter diſhoneſt, as theſe men ſpeake, and gaineſay. [1] Sapient. 1.

When *Peter*, and *Iohn* [2] were examined in the great *Councell* vpon this *Interrogatorie*; *By what power, or in what name they had doone that miracle? Peter full of the holy Ghoſt, anſwered* plainely and truely; though (happely) it might haue bene *capitall* vnto him. Then what are they *full of*, who being required by authoritie to anſwer vnto matters of no ſuch danger, vnto them; doe neuertheleſſe refuſe to anſwere directly, or who will not anſwere at all? for vpon a mans owne confeſſion *Iudiciall*, though he be not ſworne, he may aſwell be conuicted, as if hee had anſwered vpon his oathe. [2] Act. 4. v. 7. & 8

In the proceeding [3] againſt *Saint Stephen*, there were (in trueth) none *Accuſers*, but thoſe, who (by *ſubornation*) *denounced* him to the *Prieſtes*, and who are twiſe [4] called *witneſſes*, becauſe they depoſed againſt him. yet when the *high Prieſt* aſked him [5] thus: *Are theſe things ſo? Stephen* refuſed not to make anſwere, and that truly; howbeit, they made his *Apologie* to be *capitall* vnto him. [3] Act. 6. verſ. 12. [4] Ibid. v. 13. & ca. 7. verſ. 58. [5] Act. ca. 7. verſ. 1. &c.

Likewiſe when the [6] *Captaine* asked of *Saint Paul, whether hee were not that Ægyptian, which had made a ſedition &c. Paul* anſwered directly, and flatly denied it. [6] Act. 21. verſ. 38. & 39.

Likewiſe the ſame *Saint Paul* [7] in all his other ſeuerall conuentings before authoritie, mentioned in the *Acts* (euen at the ſuite & *accuſation* of a partie) refuſed not particularly, & truly to anſwer to all that was obiected, by confeſſing ſome, & denying [7] Act. c. 24, 25. & 26.

other some of the crimes, by his *aduersaries*, and *accusers* imputed to him. But if hee had learned the readie way that is nowe deuised, not onely to answere *accusers* obiections, but the *Magistrates* owne questions: hee might haue wiped them off quickely (without such long *Apologies*) and haue willed them onely to prooue what they sayde: yet neither (expressely) affirming, nor denying any thing. No doubt, though the *Apostle*, or any of those other godly men mentioned, had beene guiltie of anie thing: yet being duely asked, they would not haue stood mute, nor haue answered doubtfully, neither would they haue affirmed more without it, then they would haue doone vpon their *oaths*, if the course of the proceeding had admitted it, and that their *oathes* had bene required.

[s] Chromatius in 5. Matth facit. can. 56. concil. Tolet. quart.

It is therefore well [s] saide by an ancient, and learned Writer thus: *Dominus inter iuramentum, & loquelam nostram, nullam vult esse differentiam:* God makes no difference betwixt our speech, whether it be without oath, or vpon our oath. And [t] *Aquinas* saith; *if he which is brought into question, and interrogated by the Iudge without his oathe, shall answere vntruely, that therein he sinneth deadly.*

[t] Thom. 2. secundæ. qu. 69. art. 1.

The olde *Christians* in the *Primitiue Church*, were as farre off from these shifts of answering vnto most dangerous *Interrogatories* demanded of them, euen by heathen *Magistrates*; as they were from all vntrue answeres thereunto. which point I minde to make apparant out of such of the Ancient Fathers especiallie, as bee auowched by the *Note-gatherer*, for condemnation of these *examinations*, and of exacting men to confesse their owne crimes. so that heereby it may bee the better iudged, howe sclenderlie their Writinges by him quoted, doe serue this turne.

Tertullian herein is very plentifull, especially in his Booke called *Apologeticon:* yet is hee quoted by the *Note-gatherer*, for a condemner of examining and interrogating men, touching their owne *crimes*, of which sort ỹ very profession of *Christianitie* was then accounted to be. *A Christian* ([u] sayth he) *if he be endited, or denounced to the Magistrate, he reioyceth in it: if he be accused, he propoundeth no defence, when he is interrogated, he most willingly confesseth: and when he is condemned, he giueth them, or God thanks.*

[u] Tertull. in Apolog. cap. 1.

By

By his complaint in the ſame place, for that *Chriſtians* were not dealt with as other offenders were, he both ſheweth, what then was practiſed in *Criminall proceedings*, by the lawes *Ciuill*: and alſo, his owne good lyking thereof. *At the Chriſtians handes* (1 ſaith he) *that onely is expected which ſuffiſeth to ſtirre vp the peoples hatred againſt them; that is, an onely confeſſion of the name of a Chriſtian, not an examination of his crime: whereas if you hold coniſance againſt any offendour, as a manſleaer, ſacrilegious, inceſtuous perſon, or publique enemie to the ſtate, (theſe being vſuall praiſes giuen vnto vs Chriſtians) you doe not pronounce ſentence vpon the bare confeſſion of the name of the crime: but you enquire alſo of the qualitie of the facte, the number, place, manner, time, priuies, and partners. But concerning vs, you obſerue no ſuch matter, which you ought no leſſe to doe, then with thoſe others.* And againe: 2 *We are ſtill ſaid to be murderers of infants, and inceſtuous perſons: yet you haue no care to finde that out, which of ſo long time hath bene ſaid of vs. Therefore either get it out of vs, if ye beleeue it: or elſe refuſe to beleeue it, becauſe you cannot finde it to be ſo.* Then 3 followeth *this: You commaund Chriſtians by a farre ſtranger kinde of torture, viz. not that they ſhould declare, what they doe commit: but that they ſhould deny themſelues to be the men, which in deed they are.* Which vrging of Chriſtians to declare what they had committed, that *Tertullian* doeth not diſallow, if the *Magiſtrates* would haue taken that courſe with them, appeareth alſo by 4 another place. *Whatſoeuer we are charged* (ſaith he) *to haue committed ſecretly, though by others the ſame be committed openly: yet we will anſwere it point by point, or euery iote; yea euen that, for which we are reputed as peſtilent perſons, as vaine, and as men, worthie to be ſcorned and condemned by others.*

1 Tertul. ibidem.

2 Ibid. Apolog. cap. 7.

3 Ibidem.

4 Tertull. Apolog. cap. 3.

Saint Auguſtine alſo in his verie booke alledged by the *Notegatherer*, doeth plainely eſtabliſh and allowe of *Othes* taken concerning a mans owne offenſes, being in deede ſuch alſo in their owne nature. *If perhappes* (ſaith he) 5 *thine oathe be vrged*, (meaning a *Deciſorie oathe* be exacted of thee by a priuate perſon) *ſay not, I will not ſweare: for it commeth of euill which thou doeſt, but yet of his euil, that doeth exact it of thee. Inſomuch as thou haſt none other meanes but thine oathe, to purge, and cleare thy ſelfe, of the matter in handling.* But it may (perhappes) be ſaid, that the

5 Auguſt. ſerm. 28. de verbis Apoſtol. cap. 6.

oathe here meant, may be aſwel in a cauſe *pecuniary*, as *criminal*: heare therefore his iudgement in that [1] pointalſo. *When one that is in deede a wicked thiefe* (ſaith he) *heareth another, who knoweth not whether he haue committed that theft, ſaye vnto him, ſweare, whether thou haſt ſtollen it or not: if then he ſhall anſwere and ſaye,* it is againſt my conſcience, *for a Chriſtian may not ſweare: then watch me ſuch a fellowe; turne from him but a little; let that matter alone which thou waſt then in hand with; talke with him, of other by-matters: and* (*no doubt*) *thou ſhalt take him ſwearing a thouſand times: who* (vnder colour of godlines) *refuſed afore, but to take one oath.* And the ſame Father againe, touching the ſelfe ſame crime of *theft:* [2] *We knewe* (ſaith hee) *at Millaine in that place where the memorie of Saints is celebrated, and whereas deuils very ſtrangely, and terribly doe confeſſe and diſcouer themſelues: that a certaine thiefe that came to that place, with purpoſe euen there to forſweare the theft, and ſo to deceaue him, that put him to the oathe: yet was compelled to confeſſe the theft, and to reſtore againe the things ſtollen.* both which places doe plainely ſhewe, that euen for matter of *theft*, (a crime not ſimplie *capital* by the *Ciuil* lawes which there ruled) it was both lawful, and vſual to tender oathes. And the ſame father ſpeaking of thoſe who *denounce* other mens crimes to haue them reformed; he noteth vnto vs, the vſe of oathes therein at that time: [3] *In denouncing others* (ſaith he) *this moderation is alwayes to be vſed by vs, that wee relate it vnto ſuch, which may rather helpe then hurt him, (in caſe the partie ſhall ſweare falſely) either by correcting him, or by deprecation to God for him: ſo that he will by confeſſing his fault, apply this remedie vnto himſelfe.*

Saint Chryſoſtome albeit he aduiſeth men (as vnto the better) rather to looſe a piece of their money, then to tender a *Deciſorie oathe*, or *wager of lawe* vnto him, whom they ſee forward ynough to ſweare, though perhaps it be falſely: yet doeth he not deny, but they alſo might lawfully doe it: and withall teſtifieth, that ſuch *neceſſarie oathe* was in thoſe times impoſed to exact mens confeſſions, whether they had ſtollen ſome certaine thing or not. *It is* [4] *better* (ſaith he) *to looſe your money, then to tender that oathe to your neighbors: for to remitte this when you might, is no ſmall honor giuen to God. For when thou ſhalt ſay to God, that for his glorie*

1 Auguſt. ibid. cap. 10.

2 Auguſt. ep. 137.

3 Auguſt. in qu. Leuitic.

4 Chryſoſt. Homil. 16. ad pop. Antioch.

glorie I haue not adiured, or vrged an oathe of him, who had doone naughtily by ſtealing from me: for ſuch honour, God will giue thee great meed. By the which ſayings of the ſaid ancient fathers it is made manifeſt: that oaths, touching not onely matters ſuppoſed to be offences and crimes; were, and might then be impoſed vpon defendants, by *Magiſtrates:* but alſo touching meere crimes in their owne nature, & that vpon the *Inſtance* of a plaintife particularly intereſſed, but in his goods, and chattels. And yet be all theſe places (almoſt) quoted by the *Note-gatherer*, in condemnation of ſuch oathe: ſo hard was his hap to heape vp ſuch ſtore of places out of Authors, which make directly againſt his owne intention.

This ſort of *oath* was not only thus allowed in the old church: but commanded to be put in vre (as lawfull and conſonant vnto Gods word) againſt perſons conuented, and had in ſuſpition for ſome offence, euen by the *diſcipline* of one *Church*; which the moſt, and hotteſt oppugners of this oathe, do reckon to be beſt, yea, and (almoſt) to be the onely *reformation*, that may rightly be ſo called. For in the *diſcipline of France* concluded of in the *Nationall Synodes* there, holden in the yeeres 1559. 61. 63. and 65. it was [1] thus decreed: *the faithfull may be conſtrained by the conſiſtorie to tell the trueth; ſo farre foorth as it derogateth nothing from the authoritie of the Magiſtrate. They may be conſtrained,* ſayeth that *diſcipline:* but there is no *compulſion* but either *Ciuill*, which they will not arrogate to themſelues, as *torture*, or racking, *impriſoning*, *fining*, *&c.* or elſe by the parties *oathe*, which vpon paine of periurie, if he once ſweare, or vpon paine of conuiction, if hee will not; doth, as it were, conſtraine a man to ſay trueth.

[1] Tit. Eccleſ. Senate or Conſiſtorie art. 12.

And that an oathe is meant (indeede) by this *Canon*, of the *French Churches*; wee are taught both by the hiſtorie of *Camperell* a Miniſter of *Geneua:* and alſo by that, of thoſe who daunced in one widow *Balthaſars* houſe, there. For by this Cities example and modell, the *French diſcipline*, was (almoſt wholy) plotted. For as I haue touched (howbeit to other purpoſes in the ſecond part of this *Apologie*) the ſaid *Camperell* was [2] appointed by the *conſiſtorie of elders* there, to be examined vpō his oth, touching 3. *Interrogato-*

[2] Inter epiſtolas Caluin. in fol. pag. 421. & 422, vide 2. part. pag. 92.

Interrogatories; whereof alſo two concerned what he had in his very purpoſe, and intention of minde. *The dauncers* (becauſe at firſt they denyed it) were [1] put to their corporal oathes to declare the whole truthe of that meriment. But that all *Dauncing* is holden there as an offenſe, and grieuous *Crime*; appeareth by the *Ordonnances of Geneua*; and by the very laſt frame of *Diſcipline* concluded 1571. by the *French* Churches. So that wee may conclude this place, that this *oathe* in a *Criminall* matter, tendered by one in authoritie, being warranted by the politicke lawes of the *Realme*, or the Church: ought not to be refuſed, except there were ſome direct Prohibition thereof, by the lawe of God. But leaſt of all, may it (without the wilfull ſinne of *Diſobedience* againſt the *Ordinance of God*) be refuſed by any, being ſo manifoldly thus approued vnto vs euen *poſitiuely*; by the holy *Scriptures*, by the ancient Fathers, and by other *Moderne Churches* reformed, in euery of the poyntes afore challenged.

1 Calu. Farello. pag. 64. epiſtol. in fol. vide 2. part. pag. 139.

CHAP. XII.

An anſwere to ſuch obiections, as be pretended to be gathered from Diuinitie, Diuines, *and from the* Examples *of godly men; againſt miniſtring oathes vnto parties, in matters of their owne crimes.*

AFter ſo many, and (to mine vnderſtanding) plaine proofes made out of the worde of God, with ſome teſtimonies of the practiſe, and allowance of this oathe in the *Primitiue* Church: it may be maruailed (perhaps) that any thing (as from *Diuinitie*) ſhould to ẏ contrary be alledged. Neuertheleſſe, beſides foure diſcrepant opinions, one of thẽ varying from another, & holden by the *Innouators* about this matter, howbeit, eche of them tending either to the abridging, or els to the whole condemnation of this oathe; (which foure come to be diſcuſſed in the next Chapter) there be alſo ſundrie other obiections made againſt it, which are here to bee conſidered. Whereof ſome are pretended to be gathered out of the word of God; and ſome are taken from *Diuines*. And of theſe later ſort, ſundrie are by waye of *Allegation* out of their writings;

writings; and some others are brought from their *Examples*. Of those reasons that are pretended to be drawen from the *word of God*, I place that of the *Treatisour* in the first place, as most generall; where he sayeth; that by *this oathe Gods sacred institution is greatly peruerted, and forced to another ende and purpose, then he in his diuine wisedome hath appointed*. And the *Note-gatherer* sayth, *it is contrary to Gods word*. But why, and how it should be found contrarie to Gods institution in his worde, otherwise then is in part afore shewed, *in mine Epistle to the Reader*, and in other places of this *Apologie*, as occasion hath bene offered; they bring no proofe at all. And yet without any better vnderpropping, the *Treatisour* affirmeth this; euen for proofe of another point; viz. that *by this oathe, no due honour can be giuen to God, but that he is thereby rather dishonoured*. In deede if it were contrarie to *Gods institution*; then, no doubt, God is thereby *dishonoured*. For hauing laid downe, that the true *vse* and *ende* of an *oathe* is, *that due honor may be giuen vnto God, the trueth confirmed, Iustice mainteined, Innocencie protected, and an ende had of strife, and controuersie*: he thereupon auoucheth his said former assertion.

It seemeth to me, that all these *endes* cannot concurre, and meete in euery *oathe*, though otherwise it will be yeelded most lawfull. For in case the partie himselfe, by an *Assertorie* oathe doe vntruely sweare (being guiltie of some crime or offence) or whether witnesses shall truely sweare touching the said *parties* guiltines: it is most cleare, that (by such oathes) none *Innocencie is protected*, but *nocencie* either more heaped vp vpon the *partie* himselfe; or else discouered by the witnesses. Besides, when *Abrahams* seruant sware to him, that hee would not take a wife for his sonne, from amongst the Infidels of other nations: Or when a man sweareth *allegeance*, *homage*, or *fealtie*: or faithfull seruice and obedience to his *generall*, or taketh oathe of her *Maiesties supremacie*, and such like: what *strife and controuersie (I pray) do these make any end of?* Yea, or what *Innocencie* is thereby *protected?* seeing these oathes bee rather for reteyning the partie in his *Innocencie*, if hee stand (afore) well affected: or else doe serue, for discouerie o his hollow, and treacherous heart; in case hee shall make refusall of them. But let vs see how he proceeth; that the oathe which wee treate

of, answereth not vnto the other endes, which are by himselfe propounded. *The trueth in controuersie* (he sayth) *is not thereby confirmed, since there is none issue ioyned in this case, betweene parties affirming and denying.* As if the trueth of no matter neede to be *confirmed by oath*, sauing where there is first a *iudiciall controuersie*. Yet he himselfe speaking afore of the endes of an oath, made no mention of this *trueth* in controuersie; vnlesse hee will say, that he confounded the second of these ends with the last. Furthermore, what *controuersie* was there betwixt *Abraham*, and his seruant: or betwixt one that tendereth, and a *Iustice* of peace, or other, that taketh an oath to the *Supremacie?* Neuertheless, it hath bene often declared, that the very meanes, or inducements which open way to *Enquirie* in proceeding of *Office*; are as a *partie* that chargeth the other; and so a *iudiciall controuersie* dependeth. And that there neede not to be any other *formall partie* alwayes in iudgement, is many wayes shewed in the second part, euen by[1] *criminall proceedings* mentioned in *Scripture*. yea what *Scripture* is there to require alwayes a *partie promouent*, as of necessitie? Thirdly, there is euen here a kinde of *cõtestatio litis*, or ioyning of issue in ỹ proceeding of *meere Office*: viz. betwixt the *denunciation, fame*, or some other inducement as it were affirming, and charging: and the *parties* deniall, that is conuented. which point answereth also to that other argument of his, by which hee would proue; that *Iustice thereby is not mainteined*, because *there be not three persons in iudgement*. Furthermore, if such *Iustice* and *Iudiciall* course *by three*, were necessary in euery *lawfull oath*, by the worde of God: then should all *Promissorie* oathes bee vtterly vnlawfull. In which, there be but the partie *promising*, and he to whome the *promise* is made: yet not *iudicially*, for the most part.

[1] Vide part. 2. ca. 15.

He goeth further, and to proeue that *an ende of controuersie* cannot *ensue vpon such oath*; he vseth (in effect) his next precedent reason, viz. *because no quarell, nor complaint is any way depending*. First there is *a complaint made, and depending*, before such oath be tendered; and I haue shewed howe. Secondly, if there were not, yet *an ende of controuersie might thereupon ensue*, in that the partie burdened by presumptions; might (perhaps) thereupon be cleared and dismissed; and so the matter in que-

stion,

ſtion, ended. Thirdly, doe not the Lordes of the *Counſell*, and doe not *Iudges* and *Iuſtices* of Peace (oftentimes) lawfully examine ſometimes *parties* onely, and ſometimes *witneſſes*; euen where no *Iudiciall ſute dependeth?* Laſtly, hee miſtaketh the place in the *Epiſtle* to the *Hebrewes*; if hee imagine that vpon any ſingle mans oath taken, euery *controuerſie*, ſhould (thereby) preſently be decided and determined, according to that oath: which matter reſteth to be ſhewed *hereafter. *Cap. huius part. vltimo.

He ſayeth alſo, that it rather maketh more *contention*, then endeth *controuerſie*. Indeede, hee, or ſuch other miſlikers haue thereupon (of very late time) taken occaſion to make great ſtirres and *contentions* in this Church, and common weale. But aſſuredly, this oath (otherwiſe) tendeth to ending of matters doubtfull, and in queſtion; either by the puniſhment, or elſe by the clearing of defendants; and not to procure any *accuſation* as he ſurmiſeth, and calleth it: which is knowen and entred into, afore any oath be tendered.

Yet *Innocents hereby* (ſayth he) *are not cleared, ſince there is no complaint or accuſation, iudicially exhibited.* as though a man *priuately* charged with ſome offence towards his neighbor; may not alſo *priuately* cleare, and approoue his innocencie, and integritie vnto him, by his *oath*; except there were firſt a *publike iudiciall* complaint, or accuſation preſented vp betwixt them. Beſides, I haue afore ſhewed, that many oathes may lawfully be tendered and taken, where none ende of *clearing Innocents*, but rather of charging *nocents*, is propounded. Thirdly, it may fall out, that by ſuch oath, *Innocents ſhalbe cleared*; in caſe no pregnant proofe ſhall afterward be brought.

But if all theſe *endes* muſt concurre vnto euery lawfull oath; how is the *Treatiſour* conſtant with himſelfe: at leaſt, how doeth his former argument holde, whereby hee would confute theſe oaths, for that *they were neither* (ſaith he) *for aſſurance of duetie, couenant, contract, or promiſe, neither yet for confirmation of trueth in controuerſie?* for if any one of theſe laſt recited wil ſerue, to mainteine the lawfulnes of an oath; then what need all the other *ends* iointly? & if ſome one of theſe muſt (neceſſarily) be foūd in euery lawful oth; then to what purpoſe ſerue thoſe other ſeueral ends of oathes, here not required, nor mentioned: viz. that *honor may*

be giuen to God, Innocencie protected, and Iuſtice mainteined? Seing there may be *aſſurance of dutie, couenant, contract, or promiſe giuen*, without any ſeeking to *glorifie God* thereby: as heathens othes of obediēce to their ſuperiors; & any other mens oathes, for aſſurance of *promiſes*, &c. without reſpect to *protection* of *Innocencie*, and without ſuch *Iudiciall* courſe; namely, as may happen in priuate cōmerce, betwixt man & man. From theſe reaſons by him *ſimply* propounded; I wil now come to his reaſons, by way of *cōpariſon*. He cōdemneth this othe by *comparing* it to *Herods* othe; that as that was *generall*, to *giue* whatſoeuer the damſell woulde aske; ſo theſe are to *anſwere*, whatſoeuer ſhal bee demaunded.

This his imputation vnto *Eccleſiaſticall* courtes of tendering ſuch *generall oathes*, which he ſo often, and almoſt onely beateth vpon, to the entent to giue a better luſtre to the weakenes of the cauſe he defendeth: I haue (as ſeueral occaſions haue bene giuē) declared to be a meere ſlaunder. Neuertheleſſe, it was not the *generalitie* of *Herods* othe which was cōdemned. For the prophet *Ieremie* made vnto *ỳ king*, as *generall* a *promiſe* of *anſwering* what he would demaunde of him; as *Herod* made of *giuing*, vnto the dauncing damſell. But it was the raſhe vnaduiſednes of it, riſing vpon a carnall delight: and when he had made it, a more vnlawfull performance, of a thing *ſimply wicked*: which are the things, therein to be condemned.

Next to his collections by diſcourſe of reaſon, I place his anſweres vnto *obiections*; which are ſuppoſed may be made for eſtabliſhing *general othes*, or other more particular, yet in cauſes *criminal* to the partie examined. The firſt of which; is that of the high *Prieſts*, who *examined Chriſt of his diſciples and doctrine*: & he put them of, to *thoſe that heard him*: ſaying, *he had ſpoken nothing in ſecret*. But, neither anſwering to *interrogatories* being ſo *general*, as this was, nor general othes are defended. And if they were, yet it is not the example of the *high Prieſt*, refelled by *Chriſt*, that any would alledge; as he pleaſantly doth inſinuate, to burden them, and the cauſe with the greater weight of enuie, and preiudice. But touching this obiection & the true vnderſtanding thereof, more fully in the next Chapter, as in a more fit place.

1 Ioann. 18. v. 19. 20. 21.

Touching the next ſuppoſed *obiection*, (he ſaith) *It is not any ſufficient allegation to ſaye; that the partie deponent is no further*

bound

bound to anſwere, then the lawe requireth, how generall ſoeuer his oath be; ſince it is not ſafe for the conſcience of ſuch a deponent, to ſtand vpon termes, and queſtions; how farre by lawe, and by what law, he is bound to anſwere.

Not ſafe for his conſcience, &c? is not this plainly and directly to leaue it vnto the libertie, & free choiſe of ech *deponent*, in euery cauſe whatſoeuer, to refuſe to take any oath? thē which, what can giue greater ſtrength vnto that deteſtable error of *Anabaptiſme*? for if it be *not ſafe for his conſcience, to put it vpon the queſtion, how farre by law he is bound:* then may, and alſo ought the *Anabaptiſt*, and euery other fantaſtike, to be a Iudge for himſelfe; whether to take any oath at all, or onely ſo far, and in what cauſe himſelfe liſteth, vnder pretenſe of his conſcience. In that hee ſaith, *how farre by lawe, &c.* it ſeemeth to me, that he is in doubt; both, that *Gods lawe and all the lawes of the land* are againſt the *refuſall* of ſuch *oathe*; and yet that hee would (neuertheleſſe) arme all deponents againſt taking this oath, becauſe *it may not be done* (forſooth) *with a ſafe conſciēce.* In ẏ he further addeth, *and by what law*; it is probable, he would thereby inſinuate; that howſoeuer it wil not be thought good by many of thē to be refuſed, when it ſhalbe impoſed in courts of the *temporall law:* yet if the ſame oath be impoſed by force of *eccleſiaſtical* law, that it cannot then be ſo *ſafe*, vnto the *deponents conſcience*. Aſſuredly, it is moſt ſtrange, that men pretending ſuch pietie, and ſinceritie; will teach others thus to dally, with lawes, and with their owne conſciences. as if the thing were godly enough to be exacted in one *court*; but perillous to *conſcience* in another Court: albeit as well authoriſed vnto the one, as it is vnto the other.

Inſomuch, as here he yeeldeth, that this cōdition of not being *bound by any ſuch oth taken further then law requireth*; is obſerued, or vnderſtood, in miniſtring the oths which he impugneth: doth he not thereby plainely diſcouer himſelfe, to be an oppugner of that, which is but by law vrged? and an encourager of others to oppoſe thēſelues againſt lawes? or elſe it muſt follow, that none that be in authoritie do know the *lawe* therein, beſides himſelfe; or at leaſt will not deliuer it truly, doth he not alſo therein imply, that (in ſome caſes) the lawes allow of ſuch oathes; and that his charge, of miniſtring oathes that are *generall*, vnto all a mans

thoughts, words and deedes, is a plaine ſlander? inſomuch as no law requireth that, and yet the takers of this oathe; are no further bound, then the law it ſelfe bindeth.

And laſtly it appeareth hereby, if theſe oths (reſtrained but vnto that which law requires) be neuertheles *vniuſt, cruel, vngodly, & tyrannicall*: that then the lawes of this realme eſtabliſhing thē, muſt needes endure, his like hard, vntrue, and diſloyall cenſure.

It hath bin often, and no leſſe truly ſaid; that none but *Ieſuites, Seminary prieſts*, & ſuch like obſtinate *Papiſts* haue refuſed this oth in hir Maieſties time, or haue charged it to be vngodly; vntil theſe new *reforming Innouators* did ſtart vp: & that both the ſorts of thē do build vpon the ſelfe ſame grounds of argument. In anſwer of this, he ſaith; that by the ancient & godly writing entituled, *The praier, and complaint of the Plowman*, it appeareth; *that this kind of generall othes, and examinations ex officio mero were not firſt miſliked by Ieſuites, and Seminarie Prieſts; and from them deriued to others, that miſlike gouernement, and would bring the Church to an Anarchie; as the world hath beene borne in hand.*

For *general oaths*, we ſtand not: but who firſt *miſliked* examinatiō *ex officio mero*, or which of theſe two ſorts of miſlikers haue troden in the others ſteps by imitation; is not ſo material: as with what trueth, or ſoundnes of reaſon, it is miſliked by either of thē. I haue not the *Ploughmans* booke to peruſe, what is (indeed) there ſaid hereof; neither greatly skilleth it, though he were (perhaps) a good *diuine*, diſguiſed vnder a *ploughmans* title and ſtile. If he had vſed any reaſon for his ſaying, I doubt not but the *Treatiſour* would haue enforced it. But it followeth not, that whatſoeuer in elder times hath bin by ſome one, (though otherwiſe *learned, & godly*) miſliked (happely) vpon ſome particular occaſion, or vpō priuate pique of humor: that thereupon the thing it ſelfe ſhould be ſimply condemned. and if the condemnation by one, haue any ſuch great force; I hope the allowance thereof by many, and the manifold reaſons which *commend* the *lawfulneſſe*, and *neceſſitie* of it; will be of much more force, then one mans breath, and bare ſaying can be.

Now follow the *Note-gatherers* quotations of *diuines* againſt this oath: howbeit without any *allegation* ſet downe. But firſt let vs ſpeake of thoſe, which are from the *ancient Fathers*.

In

In the treatise of [1]*Origen*, which he quoteth; I find two sayings touching oaths, the one of which it is likely he meant. Indeed *we find* (saith *Origen*) *in the law, the vse of Adiuring; as in the booke of* [2] *Numbers, and in the booke* [3] *of Kings, but I am of opinion, that a man which will liue according to the Gospell, ought not to adiure another, for not to adiure at all, is like to that commandement of the Lord himselfe in the gospell; thou shalt not sweare at all.* And againe, *it had not beene seemly, that the Lord, vpon the adiuration of the high priest, should haue answered him, as though he had bene thereunto compelled against his owne will: and therefore he neither denied himselfe to bee the Christ the sonne of God, nor yet plainely confessed it.*

[1] Origen. in 5. Matth. tract. 35.

[2] Num. 5. V. 19.

[3] 1. Reg. 2. V. 16.

But if here by *adiuring* be meant all vrging of any other to sweare in what cause soeuer, whether it be by a *Magistrate*, or by a *priuate* person; for a *priuate*, or a publike cause; in *iudgement*, or *out of iudgement*, as the first of them, by the generalitie of the wordes may import: then doth this saying condemne all *oathes* simply (other then such as bee *voluntarily* taken) no lesse then it doth those oaths, that are imposed, touching a mans owne *crime*, whereof we speake. so that, in such an vnderstanding, the *Note-gatherer* himselfe (I trust) will not allow it: least both his owne, and the iudgement also that hee imputeth to *Origen*; be both touched, with a spice of *Anabaptisme*.

Therfore for clearing of *Origen*, and also some other of the fathers (hereafter by occasion of his quotations to be alledged) frō so foule an error; and from contrariety also vnto themselues in other places: the generalitie of certaine their speeches, as it were in an absolute condemnatiō of *oaths*, as might seem at first sight; must be all of them restrained, either vnto accustomable *vaine swearing*, which men vse in common talke; or else to the exacting and driuing of defendants, to sweare, & to *wage their lawe* by *necessary decisory*, and *iudicial* oaths, for a trifling peece of mony, or goods: notwithstāding, the plaintife perfitly knoweth aforehād, that if the defendant take it, hee is thereby induced into periury: Or lastly vnto rash, & vnaduised oths, or not being in ỹ takers power to perform. That al their speeches seeming absolutely to cōdemne al oths, ought none otherwise to be vnderstood; you shall haue cleare testimonies frō themselues, euen in those very places (for ỹ most part) that be quoted by ỹ *Note-gatherer*. So far is it of,

that

that any of them directeth his ſpeeches againſt this kind of oath that we defend.

Now then for the clearing of the firſt point; that is to ſay, that diuers of ſuch their *Inuectiues*, are directed againſt *vaine*, and *cuſtomable ſwearing* in common talke. Saint [1] *Auguſtine* ſayeth, *it is no ſinne to ſweare truely: but in that it is a greeuous ſinne to ſweare that which is falſe; no doubt hee is farre from the ſinne of periurie, who ſweareth not at all.*

[1] Aug. Ser. de decoll. S. Ioan. Bap. Ser. 10.

Saint *Chryſoſtome*, who in euery of his *Homilies* (almoſt) to the people of *Antioch*, is moſt earneſt againſt *ſwearing*; inſomuch as in one place he [2] ſaith, *the nature of an oath is to pierce further, and more dangerouſly, then a ſword:* yet he ſheweth how his ſpeeches thereof (in part) are to be expounded; and that he doth not condemne all oathes *ſimply*, which abſurditie, the *Note-gatherer* muſt firſt yeeld vnto; before he can make one droppe of that his own thick myſt of quotatiõs, to ſerue the turn that he entẽdeth.

[2] Chryſ. Homil. 15 ad pop. Antioch.

[3] Chryſ. Homil. 4. in fine, ad pop. Antioch. *It is no maſterie* (ſaith [3] *Chryſoſtome*) *to ouercome the cuſtome of ſwearing, if we will but affoord a little indeuour to that ende.* And a little afore that thus: *Caſt out of your mouths that wicked cuſtome of ſwearing.* And elſewhere, to like purpoſe: *an oath* (ſayth he) *hath this euill in it, that whether it be broken, or kept, it maketh a man ſubiect to puniſhment.* But that he heere meaneth only the *priuate* cuſtome of ſwearing; appeareth by the reaſon added; *for* [4] *the continuall ſwearer, ſometimes willingly, ſometimes vnwillingly; ſometimes when he knoweth it, & ſometimes when he knoweth it not: when he ſpeaketh in earneſt, and when he ſpeaketh in ieſt; & oftentimes being carried away by anger, or other perturbation; can not chooſe but forſweare himſelfe withall.*

[4] Idem. hom. 14.

To the ſecond point, viz. that their meaning elſe-where is of *waging lawe*, by *Iudiciall* and *deciſorie oathes*, tendered by priuate men about debts, and chattels, when by ſuch oathe, the party to ſweare is moſt likely to be forſworne: Firſt [5] *Athanaſius* ſaith; *Let your yea be yea, and your nay nay: thus farre we that be Chriſtians may confirme our ſpeeches: but let vs not proceede ſo far as to flie vnto oaths, and to call God vnto witnes, for corruptible moneis ſake.* And in that ſenſe is it to be taken, which hee ſaieth a little after: *men do* [6] *not ſweare only for worldly buſines ſake, but rather to cõfirme truth; and to ſhew that which they ſay to be voyd of falſhood, therfore if*

[5] Athan. de paſſ. & cruce Dom. col. 3.

[6] Athan. Ibidem.

if he that ſweareth be true, and to be truſted, what need is there of his oathe: but if he be not to be truſted, why do we commit ſuch wickednes, as that for wretched, and mortall mens cauſe, we ſhould call God, who is aboue all, vnto witnes?

S.[1] *Chryſoſtome* alſo ſaith thus in this behalfe: *Let vs not driue our brethren to an oathe. O man, doſt thou know what thou doſt herein? in that thou makeſt him ſweare vpon the holy table, where Chriſt offered vp, is laide: wilt thou euen there ſacrifice thy brother?* And againe, *it*[2] *is better that we loſt our mony, then to offer our brother an oathe*, that he had it not from vs, or owes it not vnto vs. Likewiſe, *if a man ſay vnto me* (ſaieth[3] hee) *take thine oathe: let him heare, that Chriſt hath forbidden it; and ſo I ſhall not neede to ſweare.* But how this is meant by him, is declared in the ſame *Homilie: but*[4] *you will ſay vnto me* (ſaieth he) *there be many, which if they be not ſworne, will not ſticke to defraude me of my money: yet will they not deny it vpon their oathes. Man, thou deceiueſt thy ſelfe; for hee that is vſed to ſteale, and to iniurie his neighbour, will not make doubt (for the moſt part) to forſweare himſelfe.* Where, we may note, that albeit *Chryſoſtome* diſſwadeth *plainetifes* from it; yet oathes in thoſe dayes lawfully were tendred to ſuch, as were ſuſpected to haue ſtollen other mens goodes. Which kinde of oathe for ſtollen goodes *deciſorily*, or *iudicially* tendred; that *Chryſoſtome* did not ſimply condemne; may be gathered by his words then next following. *But*[5] *what ſhould I ſpeake* (ſaieth he) *of ſuch oathes, and omit Iudiciall oathes, that are vſed in courts, for which ſo much can not be ſaide: for there, euen for a matter of tenne halfe pence; oathes are taken, and periuries alſo be committed.* And therefore a little after; *Lo, I ſay vnto you and proteſt, that ye reforme theſe ſuperfluous Iudiciall oaths, and bring rather all ſuch matters vnto me.*

Saint[6] *Auguſtines* allowance (in ſome ſort) of the like *oaths*, is alſo manifeſt. *If any* (ſaieth he) *ſhall prouoke thee to ſweare, as (happely) ſuppoſing he may thereby be ſatisfied, if thou ſhalt ſweare touching ſuch a matter which hee ſuſpecteth thou haſt committed, and (perhaps) thou haſt not done it: if in this caſe (I ſay) thou ſhalt ſweare, to remoue that falſe ſuſpition from him, thou doſt not ſinne, as hee doth who prouoked thee.*

But an other more full determination of Saint *Auguſtine*, touching that which is meant to be condēned in impoſing oaths

[1] Chry. Hom. 15. ad pop. Antioch.

[2] Idem. hom. 16.

[3] Chryſ. hom. 26. ad pop. Antioch.

[4] Ibid, hom. 26.

[5] Hom. 26. ad pop. Antioch.

[6] Aug. ſerm. altero viz. 11. de decollat. ſanct. Ioh. Bapt.

in priuat cauſes; ſeems to me, to be apt, & very ſound. *In him that exacteth an* [1] *oath* (ſaith he) *there is great difference, whether he know not, that the other wil ſweare falſe, or indeed knoweth that he wil. For if he know not, and therefore do ſay, ſweare vnto me: it is not ſinne then to ſweare for his ſatisfaction, howbeit it is an humane weakeneſſe in the exacter. But if the caſe be ſo, that he which exacteth it, knoweth the other party to haue done it; and yet will compel him to ſweare*, who is ready thereupon to ſweare falſely; *then is the exacter a very murderer. for though the one do murder his owne ſoule, by his periury: yet the other that ſo exacted it, did* * *thruſt forward, and harden the ſaide murderers hand.*

[1] Aug ſerm. 28. de verbis Domini.

* Manum interficientis impreſſit, & preſſit.

Touching the third, and laſt point, viz. if their writings by him quoted againſt oathes, be not directed againſt them in any of the 2. former reſpects: then it is, in regard of the vnaduiſednes of ſuch oths take, or for that the matter wherof the party ſware, was not in his own power to perform. This may be ſhewed by a place yet vnexamined, which he quoted out of *Chryſoſtome*. For he [2] ſaith, *Not only thoſe who forſweare, but alſo thoſe, that impoſe ſuch neceſſity of periury vpō others, & thoſe who ſweare, are guilty of the like crimes.* That this is ſpoken of *raſh* oathes, not lying in their power to performe, and impoſed alſo by *priuate perſons*, his wordes following do ſhew. In *ſhops* (ſaith he) in *ſtage-playes*, *yea the Artificer of his apprentice, the Schoolemaſter of his ſcholler, the Miſtres of her maid ſeruāt, do now adays exact oths, for performing of their taske enioyned.*

[2] Chryſ. hom. 14. ad pop. Antioch.

And *Saint* [3] *Ambroſe* in the place quoted, ſpeaketh to none other purpoſe. for writing vpon theſe words, *I haue ſworne, and haue purpoſed to keepe the iudgements of thy righteouſneſſe*, ſaith thus: *No man ſweares well, but he that may know what hee ſweares: to ſweare then is the iudgement of knowledge, and the witnes of the conſcience, &c. haue light, that is the knowledge of the trueth afore thee, when thou diſpoſeſt thy ſelfe to take an oathe, ſo ſhal not the bond therof hurt thee. The Lord, who came to teach the yong ones, to inſtruct nouices, and to confirme the perfite; ſaith in the Goſpell, ſweare not at all: becauſe hee ſpake to thoſe, that were weake. to bee ſhorte, hee ſpake not this to the Apoſtles apart, but to the multitudes. for he therfore would not haue thee to ſweare, leſt thou forſweare &c.* and a little afterward thus: *Follow not therefore any mans example in ſwearing, if it lie not in thy power to obſerue, and fulfill what thou ſweareſt.*

[3] Ambroſ. in pſal. 118. ſer. 14. col. 4.

But

But the *Note-gatherer* willeth vs alſo (for this purpoſe) to ſee an example of *Chryſoſtome*, refuſing the *oath* (as he ſpeaketh) and thereto quoteth two *Eccleſiaſticall hiſtories*. That[1] which is found in *Sozomen*, is ſo farre from noting *Chryſoſtoms* refuſall of an oth, in reſpect it concerned ſome crime imputed to himſelfe; that there is not ſo much as mention of an *oath*, nor of any particular *crime*. For there is declared only, how the *Synod* vnder *Theophitus* cited *Chryſoſtome* to appeare, and that hee ſent vnto them a *Biſhop* ſignifiyng; *that he refuſed not to be iudged: but that he was readie, (ſo hee might knowe who accuſed him, and of what crime) to defend himſelfe; yet alwayes prouided, that it ſhould be in a more ample Synode then that was. for he was not* (hee ſaid) *ſo fooliſh, to endure them to be his Iudges, who were his manifeſt enemies.*

[1] Sozom. l. 4. c. 17

The two Chapters by him alſo[2] quoted out of the *Tripartite* hiſtorie, haue no more colour then the other, of *Chryſoſtomes* refuſall of an oathe. for none oathe is mentioned at all in either of them, much leſſe to haue beene miniſtred, and therfore none coulde bee refuſed by him. The firſt of them conteineth, the returne, and calling home of *Chryſoſtome* foorth of baniſhment, and the particular occaſion of the tumulte that thereupon enſued. For his enemies beeing incenſed againſt him, for that hee preached to the people, they ſought to depoſe him from his *Archbiſhopricke*, vpon colour that hee had ordeined one *Heraclides*, whome they (though in his abſence) accuſed to haue cauſed certaine to be whipped, and carried about bound in chaines thorow *Epheſus*. ſo that when *Chryſoſtomes* friendes deſired to haue a more due courſe of proceeding vſed in accuſing *Heraclides*; which the faction of *Theophilus* of *Alexandria* withſtoode; there fell out thereupon, betwixt the two factions great bloodſhed, and ſome murder.

[2] Tripartit. hiſt. li. 10. c. 14. & 17

The ſecond of theſe 2. places ſheweth, how whē *Chryſoſtoms* accuſers were much afraid, leſt (to their great peril) he ſhould be acquited: yet his partial Iudges were cōtent to cōdemn him: only vpō pretence; that wout the decree of a *Synode*, he had (being indeed diſorderly afore ſuſpended) taken vpon him to ſit in the *Epiſcopall chaire*. Theſe two points (I aſſure you) are in mine vnderſtāding the neareſt in any of thoſe chapters; to ẏ purpoſe, for

which they are brought, in which reſpect, I am aſhamed, that we which profeſſe the goſpel, ſhuld (by perturbatiō) ſo far be caried: as either not to diſcern, that no refuſal of oth cā hence be gathered, or if we wil vnderſtand it; ſhuld ſo vntruly, & friuolouſly by nūber, & not by weight; quote places that looke nothing ẏ way.

Of *Gregories* writing vpon the booke of *Kings* (which he alſo quoteth) I find no mention in my booke. But I find it noted, that he writ ſuch, & others alſo, which were burnt after his death vpon emulation, as *Iohannes Diaconus* in *Gregories* life, cōplaineth. His other quotation out of *Gregorie*, toucheth not this matter of *oathe*, and is anſwered elſe-where. And ſo what here, and what in other places afore (as they fell in moſt fitly) I haue anſwered (I truſt) al the *Note-gatherers* quotations taken out of the *ancient Fathers*, and other old Writers.

Whereby (I hope) is iuſtified that which I writ in *the epiſtle to the Reader*; that moſt of thē that pertain to this matter of *oaths*; may ſeeme to haue bene collected together, againſt al taking of *oaths* whatſoeuer (though being truely vnderſtood as the ſame places do expound, no ſuch matter followeth thereon) rather thē to make any ſhew againſt *oaths* in *criminal* cauſes; which ſome of thoſe places do (in truth, as you haue heard) plainly eſtabliſh, and none do condemne or diſallow. And it appeareth likewiſe, that they can no way be retched out, to touch oathes in cauſes of *crimes*; except wee expound them abſolutely to condemne all oathes: which to impute vnto thoſe fathers were great iniurie and vntruth; and yet no way aduantageable to this cauſe.

But both he and the *Treatiſor*, do alſo aſſaile vs (in this point) with ſome allegations out of *Canons*, and later *diuines*: as firſt, where[1] *Gratian* alledgeth the ſaide *Gregories* authoritie, that *no reaſon doth lay neceſſity of proofe vpon the defendant*. What he imagineth may follow hereof to his purpoſe, I know not: except he thinke the defendants confeſſion vpon oathe, being firſt burdened by *fame*, *preſentment*, or ſuch like; may bee accounted for a proofe, vndertaken againſt himſelf. Beſides, that place ſpeaketh, when there is an *accuſation* preferred; and then may not the defendant (by *Lawe*, or *Canon*) be examined of the *crime* vpon his oathe, vnleſſe it be at the time of his *purgation*.

[1] 6.q.5.c.quod autem.

He likewiſe quoteth[2] *Gratian*; alleadging an epiſtle of *Steuen* the

[2] 2.q.4.c.conſuluiſti.

the fift, a *Biſhop* of *Rome*. the words thereof, which he meaneth, I take it, are theſe: *publike crimes are committed to my iudgement, vpon the parties willing confeſſion, or vpon proofe by witneſſes: but thoſe that are hidden, and vnknowen, are to be left to him, who onely knoweth the heartes of the children of men.* In that the *confeſſion* (here ſpoken of) is required to be *voluntarie*; perhappes hee meant abſolutely to inferre; that no man may be vrged (by his oath) *to confeſſe a crime.* But what the matter was, and the circumſtances, are firſt wel to be weied. The doubt there propounded, and to be anſwered, was this: *When yong infants are founde dead in bed with their parents; whether the parents were to bee put to the vulgar purgation, of enduring hote burning yron, or ſcalding water, thereby to trye whether they had not oppeſſed, nor ſmothered them?* And the anſwere is; that theſe kindes of *vulgar purgation*, are ſuperſtitious, and condemned by the *Canons*, as being a tempting of God: and then followeth that which is afore alledged. The caſe then being ſuch; the parents might not (by lawe) be put to any *purgation* at all. For the *vulgar* aforeſaid, is vnlawfull; and they could not be put to their *Canonical purgation*: inſomuch as thereby [1] they ſhould be ſworne, touching the verie trueth of the matter, and that would induce *anceps periurium*: in which caſe an oathe [2] may not be impoſed. For if they ſhoulde directly haue ſworne that they did not oppreſſe, or ſmother their infant; in ſo great vncertaintie thereof (as muſt needes be, whiles men be on ſleepe) it might happen: that thereby they ſhould (in deede) be periured; though not knowing certainely, whether they had ſo done or not. And [3] *Interpreters* doe wholly agree, that this was the onely reaſon, why an *oathe* might not (in that caſe) be impoſed: & not any regard which was had (ſimply) to condemne all *vrging* of men, vnto confeſſion of their *crimes*.

That which the *Notegatherer* [4] alledgeth out of the *decretall Epiſtles*; onely toucheth the condemnation of that *vulgar purgation*, in thoſe times much vſed. We may reade euen in our owne hiſtories of a *Q. mother* in this land before ỹ conqueſt; who being charged (by great preſumptiõs) of incontinent life, with the then *Biſhop of Wincheſter:* is ſaide in the courſe of *vulgar purgation* to haue cleared her ſelfe, by going barefooted and vnhurt, ouer nine red-hotte plough-ſhares, if we may beleeue ſtories.

1 c. quotiens de purgat. Can.

2 L. Videamus. ff. de in litem iurando.

3 Archid. in d. cap. conſuluiſti. nu. 2. Geminianus ibid. nu. 2. & 3. Præpoſit. ibid. nu. 5.

4 c. vlt. de purg. vulgari.

Of later *Diuines*, he alſo quoteth *Tyndall*, in ſeueral places of his works. In ý firſt of theſe, I take it theſe[1] words of *Tyndal* be meant: *neither ought a Iudge* (ſaith *Tyndall*) *to compell a man to ſweare againſt himſelfe, that he make him not ſinne and forſweare.* he yeeldeth then (by implication) that in ſome caſes a ſuperiour may compell his inferior to ſweare: and ſo much doe his words next precedent importe. Indeede we all confeſſe, that where there is great & *apparant probabilitie*, that the party is ſuch a man, who wil rather *forſweare*, then confeſſe a trueth againſt himſelf; vpō ſuch a man, an oath ſhould not be impoſed: But where the penaltie is not *capitall*, nor of *mutilation*, nor none other particular ſtrong preſumption to induce ſuch ſuſpition touching the partie; and eſpecially where he ſtands afore charged vpon good, and probable grounds, to haue (in deede) committed ſuch a fact; there the lawe will not intend, or preſume; but that he will make further diſcouery, rather then to be forſworne: *quia nemo præſumitur immemor ſalutis æternæ*, as afore hath bene aleaged.

1 Tyndall in 5. Matth. pag 208.

Albeit *Tyndall* ſeeme in this place to inſinuate (& that truely) that in ſome other caſes, an inferior may be compelled to take an oath: Yet in the next place quoted, he taketh away *all neceſſarie* oathes, and leaueth none but *voluntarie*. whereby his iudgement in this matter of oaths (though otherwiſe a godly *martyr*) is much lightened. *No Iudge* (ſaith he) *ought to make a man ſweare* [2]*againſt his will, for many inconueniences. If a man receiue an office, he that putteth him in the roume, ought to charge him to doe it truely, and may, and happily ought, to take an oath of him. If a man offer himſelfe to beare witneſſe, the Iudge may, and of ſome (happily) ought to take an oath: but to compell a man to beare witneſſe, he ought not.*

2 Tyndall in reſp. ad Morum. pag. 309.

I would gladly hereupon aske a queſtion of the *Notegatherer* (who preſſeth vs with this mans iudgement) whether hee himſelfe doe (as the words lye) allow abſolutely of this, and of other his writings; both concerning *oathes* and other matters? If hee doe not, but ſomewhere reiect him; then muſt hee giue vs leaue alſo to leaue him; and not to beleeue him; in caſe he condemne all *neceſſarie* oathes impoſed by *Superiours* vpon *inferiors*, ſo well warranted vnto vs by *Scripture*, both in *humane*, and in *diuine* matters. But if *Tyndall* meane but hereby to diſalowe, *abſolute compulſion* to take oathes in *worldly* matters, then may his ſpeech

be

be better accepted. For vpon refuſall thereof in theſe matters, the lawes appoint not the parties to be *tortured* till hee doe it, which were *an abſolute compulſion*: but either doe puniſh his contumacie, and diſobedience, to the example of others; or els doe pronoũce him *pro confeſſo*, which is but a *cauſatiue compulſion*. And if *Tyndall* be thought in his wordes (afore) to condemne alſo euery *cauſatiue* or *inducing compulſion*: then doeth hee contrary himſelfe. for in his owne example of an oath giuen at taking of an *office*, there is this *cauſatiue compulſion* to be found. becauſe there is no man but by his good will, had rather omit ſuch oath, then to take it: & if he take it not, then is he to be put back, from bearing that *office*; which is at leaſt a *cauſatiue compulſion* in caſe he deſire the *office*. but if he be vnwilling to haue ſuch *Office*, and yet may haue (as *Tyndall* ſayth) an oath impoſed, then ſome oathes may be exacted, and all be not *voluntarie* onely.

It is not ſafe, nor ſound, to imbrace without all choiſe, or difference, whatſoeuer any godly, or learned man hath holden. for being men, ſometime they faile, and ſometimes (through heate of cõtradiction) they haue their affections like vnto others. And there is no kinde of men (I thinke) now liuing, who with greater facilitie, yea & diſdaine too; do ſhake off all learned writers authorities, not only *newe*, but alſo of the *oldeſt*, (where they fit not their purpoſes) then ſuch as now be the chiefeſt, and almoſt the only oppugners of this kinde of *oath*; amongs thoſe, who make profeſſion of the Goſpell.

If this our *plea* (neuertheleſſe) will not be accepted: I wiſh the *Note-gatherer* would tell mee, whether he alſo will allowe of *Tyndals* iudgement in the points folowing, viz. *though the* [1]*kings* (ſayth he) *by the falſhood of the Biſhops and Abbots be ſworne to defend the liberties of the Church: yet ought they not to keepe their oathes, but to breake them.* then (in his iudgement) not onely they may, but *they ought to breake their oathes* taken, for obſeruance of *Magna Charta*, and other matters, at their *Coronations*.

[1] Obed. of a Chriſtian pag. 137.

He elswhere alſo writeth, [2]*that the lie of Dauid vnto Achiſh king of Gath*, whẽ he had killed the people, & ſacked the countreis [3] of the *Geſharites*, *Girſites*, & *Amalekites*; *was no ſinne in him: In that, to perſwade a ſicke mã, that bitter medicine is ſweet, is charitie. & no ſinne*: And by the like [4] example of the diſſimulation of *Chuſhai*.

[2] Tyndall pag. optium. 209.

[3] 1. Sã. 27. v. 10.

[4] 2. Sam. 17. verſ. 7. &c.

Furthermore

[1] Tind. pag. 207. Furthermore *Tindall* thus[1] writeth: *If a man go out of the country from his wife, & come not at a certaine day to be prefixed, as within a yere, or ſo; let his wife be free to marry where ſhe wil.* And againe, [2] *If the woman departe cauſeleſſe, and will not be reconciled; though ſhee commit none adulterie; the man ought* (of right) *to be free to marrie againe.*

[2] Tin. pag. 208.

And towards the ende of his booke *of practiſe of Prelates*, as it was firſt printed in *octauo* in a *Dutch* letter; he not only defendeth it to bee lawfull for a brother to marrie his deceaſſed brothers wife (dying without iſſue) albeit carnally knowen by him: but vrgeth it vehemently, as a matter of neceſſitie, and of Gods *morall law*, at this day to be performed of all *Chriſtians*. which (no doubt) he writte in hatred of king Henrie the eight, and of his then mariage, with the *Q. Maieſties* mother. In which reſpect (I thinke) thoſe who after gathered together, & printed his whole workes; did leaue out all that vnſound diſputation of his.

But if the *Notegatherer*, or any other will ſay, they haue good reaſon to diſſent from him in thoſe pointes: let them then permitte it likewiſe vnto vs (in this behalfe) vpon no leſſe reaſon; eſpecially, if *Tindal* meant to condemne all *oathes* ſimply, which are not *meerely voluntarie*.

From their allegations out of *Canons*, and later *diuines* writings, I come to their *examples*, ſome whereof be vrged *poſitiuely*, and ſome *negatiuely*, that is, where this oathe was omitted. Of *poſitiue*, that example of *Sir Iohn Oldecaſtell L. Cobham* and *martyr*; mentioned by the *Notegatherer*, commeth here to bee handled, for his miſlike and refuſal of this oathe, as is pretended.

[3] 1. Vol. pag. 666. 2. edit. Yet *M. Foxe* [3] mentioneth no ſuch refuſall of an *oathe* by him, in reſpect it was *criminall*; but for that *he would not be ſworne in all thinges to ſubmit himſelfe to the Church, and ſo take what penance the Archbiſhop would enioyne him.*

The *Notegatherer* further ſayeth, *That many examples of like refuſing might be ſhewed out of the bookes of the Dutch, French, and Spaniſh martyrs, ſo that it is no new thing.* He that voucheth ſo many quotations afore, to ſo ſmall purpoſe; if he had had ſuch readie; it is likely would not haue ſpared his paines herein, though in trueth, it would haue giuen ſmall furderance, or aduantage to his cauſe. for *viuendum eſt legibus, non exemplis*: Euery refuſall

fuſall of a matter by a godly man, cannot bring in an abſolute condemnation thereof. But if thoſe examples he coulde haue brought, be like (as he ſaith) to that of *Sir Iohn Old-caſtles, Philpots, Cranmers,* or *Lamberts:* then are they not *like* to ſerue his turne; for none of thē refuſed, in reſpect they were to be examined of matters *criminall*, as it commeth to be diſcuſſed hereafter.

But hee ſaieth alſo, that *all the late fierie Placarts in caſe of hereſie, in France, Flanders, Germanie, and Spaine were by inquiſition vpon the parties oath, poſt accuſationem, & denunciationem, ſo as the partie knewe the matter firſt.* If hee had ſhewed this which he ſaith, to be true; and that oathes in caſe of *hereſie* were not giuen in thoſe countries to the defendants, to the contrary whereof wee haue direct euidence from writers of thoſe nations: yet ſerueth it nothing at all to prooue an vnlawfulneſſe in this oath, much leſſe abſolutely: for *a non facto ad non ius*, will prooue but a ſorie argument. And this anſwere may ſerue vnto all his quotations touching examples of *omiſſion*; as of *William Swinderby*, and others, which are brought by him to ſhewe, *proceedings to haue beene in England againſt Heretiques, without exacting an oath.* Beſides, it is not the exacting of an oath in *hereſie*, but in other *crimes* Eccleſiaſticall, that we doe principally mainteine: howſoeuer he doe ſeeme, rather to allowe it in matter of *faith*, then in others of leſſe *moment*. Thirdly, if when they were proceeded with in thoſe countries, *they knew the matter firſt:* then is not that true which he ſaid afore of them, viz. that their refuſals were *like* vnto that of the (aforenamed) martyrs of *England*. And by this word *firſt*, he ſeemeth at vnawares, to implie a confeſſion, that they were neuertheleſſe examined afterward by their *oathes*: howſoeuer in the ſelfe ſame ſentence he denie it. Fourthly, if by the *copulatiue* which he puts betwixt *accuſation*, and *denunciation*, he meaneth both them *ioyntly* together; then doth hee affirme impoſſibilities: for they bee diuers courſes of proceeding. Fifthly, the ground of his miſſike, is rather vpon the order of time, when the oath is miniſtred; then for the *Criminall* matter, which we ſpeake of. Laſtly, vpon an *accuſers inſtance*, an oath cannot be miniſtred in any crime by the *Ciuill* lawe, which thoſe Countries mentioned, doe moſt followe; much leſſe then vpon an *accuſation* of *hereſie*. Furthermore, in

that (he ſaith) *no Martyr in Q. Maries time was forced to an oath vntill the ſtatute ex officio* (ſo he calleth 2. H. 4. then reuiued for *attaching of heretiques*) *and the Popes authoritie were reſtored: which authoritie is now aboliſhed.* It ſeemeth he would collect, that to miniſter an oath in a *criminall* cauſe is vngodly, as being onely builded vpon the *Popes* authoritie. Indeede, if it were onely ſo grounded; then were it no leſſe impious in this Realme to builde it vpon ỳ vnlawfull authoritie, then his other vſurpations are. But there were none *martyred*, nor (I thinke) ſo much as examined of *hereſie*, till that ſtatute was eſtabliſhed, viz. in the [1] Parliament begun *11. Nouemb.* & ended *16. Ianuar.* For the ſentence againſt *Rogers*, who firſt of all was condemned to be burned; was [2] pronounced *19. Ianuarie 1555.* viz. the yeere after. Then what maruaile is it, when as further then impriſonmẽt, they were not dealt with, or examined: though an *oath* were not miniſtred to any of them? But that in any *ordinary Eccleſiaſtical* court, from the commingin of *Q. Marie*, till the end of that *Parliament*, wherein that ſtatute was reuiued, ſuch oath was not, for any other *crimes* tendered: is (I beleeue) ouer pregnant a *Negatiue*, then that it can be prooued by him, or by any man. And therefore neither the *examples* of thoſe who are pretended to haue miſliked it, nor the ſuppoſed *omitting* of it, vnto ſome that were dealt with for *hereſie*; doe not, nor can ſerue to prooue any vnlawfulneſſe, or vngodlineſſe to be in ſuch oath, as we defend. So that we may conclude, that our former reaſons vſed to prooue the lawfulneſſe of it by Gods word; doe reſt yet vnſhaken; notwithſtanding any obiections hitherto made to the contrary.

[1] 1. & 2. Phil. & Mar. cap. 6. An. 1554.

[2] Fox pag. 1030. 2. edit.

CHAP. XIII.

Foure ſeuerall opinions of the Innouators, *againſt the parties taking of oath in criminall cauſes, with anſweres alſo vnto their reaſons, and obiections.*

AGainſt the *miniſtring* and *taking* of this *oath* by a mans owne ſelfe; the *Innouatours* doe alſo holde ſundrie opinions; and doe make many other *obiections* and *arguments*, meete to be viewed, and briefly, as may be, anſwered.

It

It may not be looked for, that I ſhould touch them all; becauſe not many of them are come to mine handes; neither (if they were) will leaſure ſerue, nor if it would ſerue, were it worth the while, they be ſo friuolous, but eſpecially becauſe their conceits, and opinions (in this behalfe) are ſo manifold, ſo variable, and intricated with ſuch contradictions one againſt another, and of the ſame man againſt himſelfe; as (I doe aſſure you) it is a worke of more labour, to ſet downe certainely, what they holde about this matter; then to confute them. But it is meete that errours ſhould ſo be, viz. diuided into many heads, one of them hiſſing againſt another: howſoeuer they be tied together by the tayles like *Samſons* foxes, to ſet both *Church & Common wealth* on fire.

So neere as I can collect them, their opinions be of foure ſortes. The firſt is of thoſe; who being required to take ſuch oath, truely to anſwere the matters, whereof they be brought into queſtion (the chiefe heads whereof, are alſo made knowen firſt vnto them) will anſwere neither yea, nor nay, either touching the trueth of the matters, or what they reſolue to doe, but onely thus, viz. if you haue matters againſt me that be *manifeſt*, then proceede to prooue them by witneſſes: if they be hidden, then tarie *till the Lord come, who will* [1] *lighten things that are hidden in darkeneſſe, and make the Counſels of the hearts manifeſt.* And theſe (commonly) will call for an *accuſer*. And if it be tolde them, that the *common voyce*, a *preſentment*, or other *iudiciall denunciation*, or the *publike intereſt* &c. is their *accuſer*, that brings them into queſtion, then come they againe to the firſt poynt, and bid their *accuſers*, and their *witneſſes* to come, and ſtand forth againſt them. [1] 1. Cor. 4. v. 5.

This dealing, as it is moſt *peremptorie* and *frantick* of all the reſt, ſo it is moſt vnreaſonable and dangerous: for it tendeth to the taking away of all *Iudiciall* courſes, both *criminall*, and *Ciuill*. To what purpoſe ſhould a man produce witneſſes, before the defendant hath anſwered directly, what hee confeſſeth, and what he denieth, and would haue prooued?

Neither is this to deale ſincerely, iuſtly, and vprightly, as we woulde haue others to deale with vs. For we ſhould ſpeake the trueth one to another, and not ſeeke to circumuent any, by cautels, and *fruſtratorie ſhifts*; but leaſt of all in matter of

iudgement: where, by law, and by the Magistrate (that is *lex loquens*) we are required, and be (in conscience) also bound to procure, that controuersies doubtfull, may be composed with least adoe, and trouble, to the intent, that which is right and trueth in euery cause (expedient to be knowen) may quickly be knowen, and come to light. Such froward answeres as this is, doe rather put off the *Iudge* with *contempt* and *disdaine*, then yeelde any good reason, why such oath should be refused.

This pretended *dilemma* of theirs, hath many *media* or meanes, to make it easie to be dissolued. First, a *crime* may be so *manifested*, that the supposed offender becomes (thereby) noted, *infamed* and *scandalous*; and therefore fit to be *enquired* of; albeit happely the thing be done so *couertly*, or of his owne nature be so *hidden*; as it cannot be exactly prooued by witnesses. For wicked, and lewde persons make all prouision that may be, that there may be no witnesses, of their wickednesse. And therefore it is meete, that such (being probably touched) that witnesse *instar omnium* be vsed, and called on by them; who knoweth all things,
[e] Apocal. 4. v. 6. & before whom the whole world stands as a [e] sea of *pure Christall*. Some examples of such *crimes* are shewed in the eleuenth Chapter, by the *Scriptures*.

And what shall witnesses neede, if the partie himselfe will not denie it? Or what if the witnesses be not meete to be knowen at first, least the *partie* vpon his oath, or otherwise, discouer no more (when he once knoweth them) then he supposeth by them can be deposed? Or what if (at the parties first conuenting) no witnesses be knowen, that can testifie, but doe come afterward vnto the *Iudges* knowledge?

Touching *hidden* crimes (if they be *simply* hidden, and in such sorte, as is meant by that place of *S. Paul*, and by the like rules in lawe) it is very true; that they are not to bee *enquired* after, by any Magistrate, neither is any man bound to reueale such. Therefore it may not bee asked of any man (as was done in *Popish shrift*) what faults and sinnes hee knoweth by himselfe. Such be the *counsels*, and secrete thoughts of *mens hearts*, spoken of by *Saint Paul* in that place, and all actions also not come abroade at all, nor *manifested*, either by *fame*, or by other good *presumptions*, or *euidences*. For before they be (at least) so

manifested,

manifeſted, it is not of any poſſibilitie, to make *enquirie* or queſtion after particular *crimes*, when they bee not ſo much as ſuppoſed to be done. Concerning which *crimes*, what the law *Eccleſiaſticall*, and practiſe is, I referre you to the ninth chapter of this third part. But if they ſhall be once ſo *manifeſted* abroad, (as before is declared) then is not the fault *ſimplie hidden*, but in part is manifeſted, and brought to light; and therefore is it fit, and conuenient; that the *partie* be either *cleared* of it, or *corrected* for it.

Beſides, that place of S. *Paul* is not meant of any *Iudiciall* proceedings; but of *priuate*, raſh, and vncharitable iudging of our brother (in the worſt part) without any iuſt ground thereof; as if wee would take vpon vs *Gods* owne office, and would iudge the inward cogitations of another mans heart. Such peruerſe iudging, our Sauiour *Chriſt* alſo [1] condemneth in the *Goſpell*. But it pertaineth nothing vnto ſuch *enquirie by oath*, as the *Magiſtrate* hath good *enducements*, and *preſumptions* for, to enter into.

[1] Matth.7.v.1, Rom.2.v.1.

Another ſorte, no leſſe pernicious then the former are thoſe, who will pretend not to refuſe to take an oath in a cauſe *criminall*: but yet they will doe it with this *limitation and proteſtation*, that they entend not thereby to be bound, either to *accuſe* themſelues, or their brethren. By *accuſation*, meaning the reuealing of any thing; for which they, or their brethren, may be troubled or puniſhed.

Vpon what ground, other then the generall reaſons of the reſt, and of the *Ieſuites* (as if it were againſt *nature*, and *charitie*, *&c.*) theſe ſhould build this opinion; I (for my part) cannot wel coniecture. But it ſorteth to this paſſe; that ſeeing we are all *brethren, and members one of another*; therefore it ſhall not be lawful for the *Magiſtrate* to puniſh any ſinne or tranſgreſſion, ſauing where himſelfe doeth take the offender with the *maner*: yea and ſcarſe then too. For they will hardly (I beleeue) allowe, that the ſame man ſhall be *accuſer, witneſſe*, and *Iudge*. For they conceiue (howbeit erroneouſlie) the *Iudge* who proceedeth of *office*; to be an *accuſer*. This plainlie followeth of it, becauſe no ſinne may lawfully be puniſhed, but where the partie is *convicted*. There can be none other *conviction*, but either by the parties owne *confeſſion*, or vpon *depoſitions of witneſſes*. So that if no *Chriſtian* be bound,

nor ought (before a *Magistrate*) to reueale either his *owne*, or his *brothers* offences; then doeth it followe, that crimes shall neuer be punished, till the offenders themselues (being moued in conscience, if happily they shall euen then, by these men be suffered, to *accuse*, or *discouer* themselues) shal wilfully come in, and desire (for Gods sake) to be hanged vp, or otherwise punished; as the qualitie of their offence leadeth.

Amongst the heathens, I reade of no nation, but they vsed and had oathes in great estimation, and necessarie practise; sauing [1] the *foolish Phrygians*, who onely condemned them. And amongst *Christians*, the olde heretikes *Manichees*; of later times, the *Anabaptistes*; and now lastly these fellowes. who (albeit not in plaine wordes) yet in very deede, doe (vpon the matter) take away all oathes in matters *criminall*, and consequently all, both *Ciuill*, and *Ecclesiasticall* punishments and censures, from among men. For [2] *Manes* the olde heretique taught; that it was not lawfull for Christians to sweare at all.

1 Alex. ab Alex. Genial. Dierum. li. 5. cap. 10.

2 Cyprian. in exposit. Symboli.

The third sort of opinions (being deliuered by diuers of the more learned sorte of the *Innouatours*) are of such, as holde; that they may reueale both their owne, and their brothers *crimes and offences, to remoue euill from the land* (as they speake) when they are duely charged thereunto by oathe. But some actions there be, which they beleeue to be well, and lawfully done; and yet by lawe, or iniquitie of the time, they holde to be such, as may bring trouble, and punishment vpon them. And those, (they saye) they are bound in conscience, not to declare at all. This opinion for ỹ first part thereof, is directly cõtrarie, to the next afore precedent.

But who shall iudge, whether such matters, as they be *enquired* of, ought to be accounted for faults and offenses, and which being punished, *will remoue euill from the land*, or whether they be (in deed and trueth) good & *vertuous actions*? I greatly feare, that these men wil not (in this point) be content to be ouer-ruled, either by the *lawes* of the Realme, or by the *Magistrates*, & *Iudges*, that be interpreters of the lawes. But (no remedie) an *oathe* they will not take, till they shalbe satisfied, and resolued (which they can make as long in doing, as them selues lust) that such *actions* be iustly and lawfully to be condemned, for *Crimes* and offenses, by Gods lawe. So that this is nothing else, then to permitte vn-

mitte vnto euery priuate ſubiect the iudgement how farre, in what cauſes, and againſt whom he needeth to declare his knowledge, of any matter: how expedient ſoeuer for *her Maieſtie*, and vnto the whole common-wealth it be, to be knowen. Is not this to put a ſure buckler into the hands of *Ieſuites*, other *traitors*, *murderers*, *felons*, and euery lewde companion, to holde foorth againſt the lawfull *examination* of *Magiſtrates*, touching themſelues, or their complices? For if they neede not declare any thing by *oathe*; much leſſe will they haue conſcience to doe it, when they are not ſworne: which forbearing of the *parties* own oath in examination of *crimes* (that may be *capitall* to him) is alwayes obſerued in this *Realme*.

Perhappes, vnto this abſurditie, following of their opinion, it wil be ſaid; that thoſe aboue rehearſed, are knowen and *manifeſt crimes* to all men, euen by the light of nature: but ſo are not their *Diſciplinarie*, and *Synodicall* Conſtitutions &c. It is true, that *treaſon*, *murther*, *theft*, and ſuch like; *in ſtirpe*, euen in their generall nature, are condemned for *crimes* by all men. Yet when men come *ad individuum* to the particular application of their owne factes vnto the *generall crime*: they are then contented to flatter with their conſciences, and to pleaſe them ſelues in their owne actions; and ſo with ſuch, and ſuch *circumſtances* to deny theirs, to be in any like degree. Doe the *Ieſuites* (thinke ye) when they are conuented, condemne their lewde ſeducing of her *Maieſties* ſubiectes, as treaſonable? did the damnable conſpirators with *Babington* the traytor (albeit they were not ignorant, what the lawes of the land did adiudge of their actions) when they went about their treaſons, condemne themſelues as traytors: and not rather lewdly flatter them ſelues vpon ſome circumſtances, which they thought ſhould aſſoyle them of all guilt afore God? Therefore this opinion, though it cary a colourable ſhewe of ſome greater *obedience*: yet when the reckonning is caſt vp, it iumpeth (in very deede) with the ſecond. For it commeth to this point, that euery man ſhalbe his owne *Iudge*, how farre he neede to obeye *lawes*, and *Magiſtrates*, that require him to deliuer his knowledge, touching his owne or other mens factes; ſo he himſelfe will account them, lawfully done.

Beſides the abſurdities, that followe this opinion, it is alſo in it

ſelfe very vnreaſonable: For if a man may reueale his brothers, or his owne ſinne, may he not much more his vertue? If God be glorified in detecting of *ſinne*, much more in making *vertues* knowen. If trueth muſt needs be vttered of *ſinne*, much more of vertue; for *wiſedome is iuſtified of her children.* If their doings be good, & iuſtifiable, then to conceale the trueth, is (in very trueth) nothing leſſe, then to betray and forſake the trueth.

And that this is but a vaine gloſſe, deuiſed, in trueth, to couer their *miſdemeanours*, and to eſcape from deſerued puniſhment: may appeare, by the deſire they carrie (by all wayes, & meanes) to cloke their ſayd actions.

If their workes were not of darkeneſſe, and ſecrecie; they would not flie the light. For it is a propertie of *thoſe which doe euill*, to flie from the light. If their doings be workes of the light, *let that light ſhine foorth before men, that they may ſee thoſe their good workes, and glorifie their father which is in heauen.* If they ſtand aſſured, they haue done but well, what puniſhmẽt ſoeuer ſhould light vpon them for it, they ſhould confeſſe their obedience, and *T. C.* practiſe of the whole *Goſpell of Chriſt*, (whereof they make their *diſcipline* a neceſſarie part) and reioyce with the *Apoſtles*, that they are found woorthie to ſuffer puniſhment, for the *Diſciplinarian* part of the *Goſpell.*

But is not this ſtrange, that where the moſt part of this *Diſciplinarian* humour, do thinke that they ought to diſcouer nothing of themſelues, nor of their brethren, that is *criminall:* that yet theſe others, being fewer, ſhooting at the ſame markes, will (as they ſay) reueale their *crimes* onely, but nothing elſe; no not their *owne*, and their brethrens *vertues* and good deedes; belike for feare, leaſt they ſhould be counted to doe it, vpon ſome vayne glorie.

Yet this opinion giueth vs this aduantage, that if a man may lawfully reueale, and diſcouer, not onely his *brothers*, but his owne *crimes* and offenſes, if they bee truely *crimes:* then haue they no colour, but they muſt doe it, when by the *Magiſtrate*, (according to lawe) and vpon their oath, they are ſo commaunded.

That which they may *lawfully* doe, that may the *Magiſtrate* lawfully enioyne: and they (without diſobedience to Gods ordinance)

dinance) may not refuse. So that for the lawfulnes of ministring an *oathe* to a *partie*, in a cause verily *criminall*, and thereby penall to himselfe (being a maine, and principall controuersie betwixt the *State*, and them) we haue allowance by some of their complices owne *positions*; but yet wee cannot get their *practise* vnto it. But more hereof in the next Chapter.

The fourth and last of their opinions touching such oaths; seemeth to bee something better, (and euen perhaps *Classicallie* or *Synodicallie*) digested by them. Yet it caries no small *contradiction* in it selfe. which (to their most aduantage, that they can possiblie haue it vnderstood) I will seeke, (by distinction) to reconcile, and to make stand together.

These therefore may be thought generally to holde, that for any thing, whereof *witnesses* may be had, the *partie* may not bee examined vpon his *oath*. Out of which *generall*, they diduce this: that the *Iudge* may not examine a *Preacher* vpon his *oathe*, touching his *doctrine* deliuered in publike place. And if he goe about it, the *Preacher* without breach of duetie to the *Magistrate*, may lawfully refuse to sweare. But if the *crime* be so *hidden*, and *secret*, that *witnesses* may not be had; then a man may bee charged (say they) by oath. But this they also limite, and restraine thus: so it bee not *to drawe matter of accusation against themselues*. And to this purpose, they doe vse seuen reasons. Albeit the same men also say, that *to remoone euill from the lande*, they will take such oathe. *They will, &c.* But they tell vs not plainely whether they take themselues bound to doe it, or not. So that I cannot see, how to make these their opinions dwell peaceably together; except their meaning herein be this: that for crimes which be *hidden*, being in themselues euill (that is *prohibita quia mala*) they will be pleased to take an oathe to reueale them: but things that be *secrete*, where no *witnesse* can be had, and be none otherwaies *euill*, but because they be *prohibited*; such they may, and will refuse to declare, by oath. which if they meane in deed, (as it is very probable they doe) then doe they runne quite contrary to the opinions of all men besides. For if it might be left to most mens choise; they would rather discouer of themselues and others, some breaches of *Statutes*, not directly forbidden by *Gods lawe*: then such their owne *crimes* as be *forbidden*, and therefore con-

teine more turpitude in them, as *adulterie, periurie*, and such like. But it must be remembred, that these men haue an odde grace in framing opinions of *deuinitie, Pro re nata*, euen as present occasions doe leade them. And they temper not their actions (oftentimes) vnto their former conceiued opinions; but they conceiue opinions, and coyne conceites: as may best stand for defense of their owne, and their fauorers present actions. Nowe, because many of them hope to bee found cleare (in their owne persons) from *grosse* and *actuall crimes* so expresly *forbidden* by Gods lawe; but not so cleare (perhappes) in breache of the *lawes of this Realme*, and peace of the *Church*: therefore is this newe opinion stamped by them, to stoppe vp this gappe. For the proofe of this their assertion; that *where wineſſes may be had, there a man may not be examined vpon his oathe*: First they saye, for Iudges finding out by *Inquisition* what is spoken, or done, they finde two wayes in *Scripture*. One by *witnesse* of others, where they may be had; which they goe about to proue by these [1] places quoted in the margent. The other way, by the *parties* owne *testimonie*, where *witnesse* cannot be had, for the thing spoken, or done, whereof *necessarie inquisition is made*, which they would proue, by these other [2] places, here also quoted.

[1] Deut. 13. v. 12. & 15. Deut. 17. v. 2. & 7. Num. 35. v. 30. Deut. 19. v. 15. Ioan. 18. v. 20. & 21. 1. Tim. 5. v. 19.

[2] Iosu. 7. v. 19. Exod. 22. v. 7. 8. 10. & 11. Num. 5. v. 13. & 19.

But is this a good consequence; these two wayes be mentioned in *Scripture*: *Ergo*, there be no more but two? or if it were admitted, there bee no moe wayes mentioned for *Inquisition of crimes*; doeth it followe, that therefore all *positiue* lawes of *Common-weales*, & *kingdomes*, for *inquisition*, and *triall of crimes*, in any other sorte are vnlawful, & against *Gods worde*? what is this else, then plainely to ouerthowe, & condemne (as vngodly) not onely the *Inquisition* and *trial* by *Iuries* and *verdicts* of *twelue men*, vsed in this Realme, and not mentioned in *Scripture*: but also the proceedings *Iudicial* of all ỹ world besides, if they do not wholy iumpe in manner & fourme; with ỹ *Inquisitions* & trials mentioned in *scripture*? * And so (in stead of all our *positiue* laws) to bring in place, the *Iudicials* of *Moyses* (giuen onely to the people of the *Iewes*) not onely for the *equitie* of thē, but for the very *substance*, & *fourme* of them also? whereby the *Priestes* shalbe *Iudges* what is lawe, in euery difficult, & controuersed point; in whose *iudgements* (vpon paine of death) euery man must rest contented.

* This erroneous conceit *Barrow* held, in his last booke printed at *Dordrecht*.

Neuerthe-

Neuertheleſſe, by this their owne *poſition*, I thus proue againſt themſelues; that they doe wickedly in refuſing to take their oathes. Whereſoeuer in an *Inquiſition* of a crime, no *witneſſes* can be had, there (by the *lawe of God*) the parties themſelues muſt take their *oathes*, and declare the whole trueth. But of their *framing* of a booke of new *Diſcipline Eccleſiaſticall*, and *Synodicall*; of their *ſubſcribing* to it, of putting ſome of it *in practiſe*; of meeting in *Claſſical aſſemblies*, or *Conferences*; in *Synodes*, and *generall aſſemblies*; of matters there *treated* of, & *concluded* againſt the lawes and gouernement of this Church of *England*; of ſecret writing, and diſperſing of their ſlaunderous bookes, and *libels*, conteining erroneous, and *hereticall* opinions, and *ſeditious* incitements: which laſt pointes are *Prohibita quia mala*: And touching the *circumſtances* of theſe, and euery of them, no witneſſes can bee had (as experience it ſelfe ſheweth) for they were kept as cloſe, & ſecret, as could be; they were done in priuate places, & chambers; from whence all other were ſecluded, ſauing the very *parties* themſelues (being all principal delinquents) and not called thither, or being there as *witneſſes*. Therefore (by the lawe of God) they ought hereupon to take their *oathes*, and to declare the whole trueth in theſe matters. For ſo is their owne *poſition*.

Nowe I will examine their ſeuerall proofes, brought for this opinion. The firſt is this: [1] *If thou ſhalt heare ſaye conterning any of the cities which the Lord thy God hath giuen thee to dwel in: wicked men are gone out from among you, and haue drawen away the inhabitants of their Citie, ſaying, let vs goe and ſerue other Gods, which ye haue not knowen: then thou ſhalt ſeeke, and make ſearche, and enquire diligently: and if it bee true, and the thing certaine, that ſuch abhomination is wrought among you, thou ſhalt euen ſlay the inhabitants of the Citie with the edge of the ſword, deſtroye it vtterly, and all that is therin, & the cattel thereof, with the edge of the ſword.* Where you ſee, the puniſhmẽt is *vniuerſall* (though the firſt perſwaſion came happely frõ a fewe) and therefore the defection frõ God vnto *Idolatrie*, was there, amongſt the men alſo *generall*. For the iuſtice of God is, that [2] *the ſoule which ſinneth, that ſhall dye*. How can this prooue, that no *partie* to the ſinne was *examined*, but that they were conuinced onely by *witneſſes*? Nay, the contrary

[1] Deut. 13. v. 12. 13. 14. 15. &c.

[2] Ezech. 18. v. 4.

rather is manifeſt. For who is ſo fit, and ſo likely to haue knowledge of things done in a Citie, as thoſe that dwell in it? and therefore the lawe alloweth *Citizens*, for good *witneſſes* of matters there done, euen when it is for their owne benefit: becauſe (by common entendement) others cannot be had. I will aske then, whether this *generall* condemnation and execution againſt a *whole citie*, might proceede onely vpon *heareſay*? this were very vniuſt and cruel; and it is ſaide in the text, it muſt be knowen *certeinely*. But if vpon *certeine*, and ſure conuiction; then cannot it be otherwiſe, then by the *examination* of ſome perſons of that citie, who onely can knowe the *certeintie* thereof. But theſe are all *parties*, *Quia quos par culpa, eoſdem tenet & par pœna, & è conuerſo.* For God hath appointed this *negatiue* Iuſtice in his lawe: that [1] *the father ſhall not be put to death for the children, nor the children put to death for the father: but euery man ſhall be put to death for his owne ſinne.* And in the *Affirmatiue*, it was decreed in a *Councell* thus: [2] *Oportet vt vna pœna teneat obnoxios, quos ſimilis error inuenerit implicatos:* ſuch as be guiltie of the ſame fault, muſt needes bee ſubiect to the ſelfe ſame puniſhment. And therefore it followeth, that this *Inquiſition* here ſpoken of, was founde out by ſome of the parties owne *examinations*: rather then by any other *witneſſes* dwelling abroad, and therefore not able to deliuer any *certeintie*. But in ſo *penall* a matter, a man will hardly confeſſe, without torture or *oathe*: and [3] *an oathe is for confirmation.* And therefore it may happen (by the equitie of Gods lawe) that a man (in a matter *criminall*, and euen *capitall* to himſelfe) may bee *examined by his oathe*. Howe much more then, of a *crime* not ſo penall?

1 Deut.24.v.16.

2 Concil.Tolet.4.Can.78.

3 Hebr.6.v.16.

That other place of the 17. of *Deuteronomie*, is left at large, without expreſſing, whether the partie condemned there of *Idolatrie*, were to be examined vpon his owne oath, or not. Beſides, in matters *capitall*, and where there is an *Accuſer* (as in ſome ſort is there) no man in this Realme vrgeth an *oath*. But it is neceſſarilie to be gathered, that at leaſt the *partie* conuented, did anſwere the *Accuſation*, or *Inquiſition* there, by deniall, before the *witneſſes* were produced: which many of this ſorte of men will not doe, either the one way, or the other.

The other two places of the 30. of *Numbers*, and 19. of *Deuteronomie*,

teronomie, doe onely determine; that no man ſhalbe condemned vpon one witneſſes depoſition onely: and do make nothing to prooue either off, or on; whether a *partie* may be *examined by oath*, where witneſſes may be had, or not had? except they minde to gather it thus: there be mentioned onely depoſitions of *witneſſes*, to the *conuiction* of a matter: therefore no courſe beſides, or in any other fourme, may be vſed. But this cannot be; for though the partie denie it, (yea with oath) yet *vpon two witneſſes, ſhall the matter be eſtabliſhed.*

And if ſuch collection were conſequent vpon theſe two places; then albeit a man woulde willingly *confeſſe* the matter againſt himſelfe, he might not be caſt and conuicted, till *witneſſes* alſo ſhould depoſe no leſſe. But this is abſurd; in that *nulla ſunt partes Iudicis in confeſſum, niſi vt ferat ſententiam:* and in the *Goſpell, ex ore tuo teipſum iudico.* Beſides this, the condemnation by *Iuries*, were then quite to bee condemned, for vngodly. For they may giue *verdict* ſometimes but vpon one *witneſſes* teſtimonie, and ſometime without any; vpon violent, and ſtrong *preſumptions* onely, which (*in hidden crimes*) are good proofes. Neither are they of the *Iurie* to bee accounted as *witneſſes*; but are as a kinde of *Iudges of the fact.* Therefore in *Magna Charta*, it is called *Iudicium per pares*, and they much reſemble *Pedanei Iudices*, or *Recuperatores* in the *Ciuill* lawe, and *pares Curiæ* in the *Feudall* lawe, which is practiſed (chiefly) in *Italie, Germanie*, and *France.*

The place in the [1] *Goſpel of S. Iohn*, where *Chriſt* being *asked by the high Prieſt, of his diſciples and doctrine*; doth anſwere thus: *Why askeſt thou me, aske them that heard me: for I ſpake openly in the world: I euer taught in the Synagogues, and in the Temple; whither the Iewes reſort continually, and in ſecret haue I ſayd nothing*: they doe greatly inſiſt vpon, and vrge; as a commandement to this purpoſe: viz. that where any *witneſſes* may be had, there a man may not be *examined* himſelfe; but eſpecially *touching doctrine publikely deliuered.* but they are manifoldly deceiued,

[1] Iohn 18. ver. 19, 20, 21.

Euery action of *Chriſt is for our inſtruction* ſaith *S. Auguſtine*, but not euery one for our *imitation.* Therefore of any particular action done or not done, according to ſeuerall circumſtances by our Sauiour *Chriſt* (being the wiſedome of his Father) we may

not gather a generall doctrine of *imitation*; except wee were ſure of all the cauſes and circumſtances then concurring, that ſo did mooue him, at that time.

[1] Matth. 26. v. 62, 63, & 64.

When [1] *Ieſus* was falſly charged by vntrue witneſſes, hee anſwered nothing, though hee were vrged greatly thereunto by the *Prieſt*, but helde his peace. And of holding our peace in like caſe, *Origen* [2] thus ſpeaketh: *to what purpoſe is it, to gaineſay thoſe, who gaineſay and ouerthrowe themſelues, by their owne contrarieties: eſpecially ſeeing it is more worthie, freely and reſolutely to bee ſilent; then to ſtand in defence to no purpoſe: for ſo ſhall not falſe, and lewde witneſſes inſult ouer vs?* Yet when the *Prieſt* preſently thereupon, *adiured him by the liuing God, to tell them if he were the Chriſt, the ſonne of God:* he made them an anſwere; albeit in his *diuine* wiſedome he knewe, that they meant to make it *capitall* vnto him. Nowe, ſhall wee hereupon gather that whenſoeuer our wordes before a *Iudge*, bee *calumnionſly* detorted by falſe *witneſſes*, to our great danger; and wee vrged by him to make anſwere, that wee are therefore bound *to hold our peace?*

[2] Origen. tract. 35 in Matth.

[3] Ioan. 1. v. 19. & 20.

When *Saint Iohn Baptiſt* was [3] aſked by the *Prieſtes* and *Leuites*, a dangerous queſtion, ſuch as if hee had beene (as they ſeemed to doubt) the *Meſſiah*; might haue turned him to great daunger: viz. *what hee was: hee confeſſed, and denied not, but ſayde plainely, I am not Chriſt.* So that wee ſee, ſuch a *generall* doctrine as they gather, may not be collected out of the former anſwere of our *Sauiour*.

Wee are therefore to knowe, that the anſwere was very appoſite and fitte vnto the queſtion, which was infinite, and *generall*, touching his doctrine. which no man (otherwiſe then in generalitie) can anſwere, and therefore the anſwere was correſpondent to the queſtion. For it was, as if he had ſayde thus vnto them: you aske mee of the whole *doctrine* by mee taught, this is impoſſible for mee to anſwere, and to recount vp vnto you. If you thinke any thing therein (particularly) to bee *erroneous*, or *ſeditious*; enfourme your ſelues by thoſe that haue heard mee, and then what you ſhall ſo obiect, I will bee ready to anſwere. This you may eaſily doe: for that which I haue taught, I haue done it *publikely in the Temple*,

Temple, and in *Synagogues*, and not in corners. ſo that you ſhall not neede to make mee take vpon mee, ſuch an endleſſe, and impoſſible worke, as you might haue iuſt occaſion to doe, and to make mee yeelde account, if my *teaching had beene in ſecrete*. Whereupon thus I gather againſt them: if *Chriſt* being willed to giue an account of his whole courſe of *doctrine*, did therefore refuſe, becauſe it was too generall a queſtion to bee anſwered, and alſo becauſe it was in publike places onely deliuered by him, (ſo that they might eaſily firſt enfourme themſelues what they tooke to be amiſſe, and worthie to bee obiected againſt him) in ſomuch, as *hee had ſayde nothing in ſecrete*; which if hee had, might haue giuen (in trueth) iuſt cauſe vnto them to *examine* himſelfe, what poyntes they were, that hee ſo carefully did auoyde the light to teach them in: then theſe men, that bee aſked not of their *doctrine in generall*, but of their particular actions in this and that poynt, in this place, at that time, done not publikely, but (of ſet purpoſe) ſo couertly, as might bee, ſo that no *witneſſes* (but ſuch as bee alſo *parties*) can bee had: haue no iuſt defence nor colour of it, out of this place. And therefore of ſuch *hidden crimes* (by their owne poſition) they ought to anſwere by their oathes.

Beſides, *Chriſt* was not detected (afore) of any particular matter, wherewith they might charge him: neither if he had beene, was it his principall purpoſe (otherwiſe then that hee would leaue teſtimonie, that hee died an innocent) to ſtand to cleare, and excuſe himſelfe particularly; that the *determinate Counſell of God*, might take place with him.

By the premiſſes may appeare, that the three reaſons which they bring, to prooue this maner of queſtion, and *Inquiſition*, mooued by the *Prieſt*, to bee vnlawfull; are altogether needeleſſe, ſeeing no man defendeth the like. But for proofe either of that more *generall poſition*, viz. *where witneſſes may bee had, a partie may not be examined:* or of the more *particular*, viz. *that a Preacher may not be asked of any poynts of his doctrine, by him publikely deliuered*: neither doth this example of *Chriſt*, nor the places which they bring, and are here [1] quoted, make any thing at all. I would thoſe that haue leaſure, would but

[1] 1. Cor. 14. v. 30. 31. 1. Theſſ. 5. v. 20, 21. Amos 7. v. 14. Gen. 19. v. 20. & 10. 12. 2. Tim. 2. v. 2. 1. Tim. 5. v. 19.

turne to them; that they may know, with how litle either iudgement, or elſe ſinceritie, theſe men do handle the word of God.

The place to *Timothie*, that *againſt an Elder, or Prieſt, an accuſation ſhall not be admitted, without two, or three witneſſes:* maketh neither hote, nor cold to proue, that whereſoeuer witneſſes may be had, the partie may not be examined vpon oath. I haue heard it brought, to exempt them from being *enquired* into at al; except two witneſſes did firſt verifie the *accuſation*, before it be preferred. But it ſerueth both theſe turnes alike. Firſt, that place is meant, that it ſhall not bee holden otherwiſe as ſufficient to conuict him: the word is μὴ παραδέχου, allow it not. If it were meant of the firſt enterteining of an *accuſation*, then theſe inconueniences would follow. that the *accuſer* who at his owne perill *debet venire paratus*, ſhould (by the very receiuing or reiecting of it) knowe afore hand; what his witneſſes haue depoſed, or can depoſe. Secondly, that witneſſes might bee examined to a mans preiudice, *parte rea non citata*, or els that they muſt be twiſe examined; once before the *accuſed* doe appeare, and once afterwards. which is a needeleſſe trouble, where proceſſe *informatiue* is not vſed.

Beſides, thoſe men (that clayme it) are proceeded with, not *per viam ἐγκλήματος of accuſation*, as *Saint Paul* there ſpeaketh, but by way of *Enquirie*. And yet there be witneſſes (in ſorte) of their crimes, before the accuſation be receiued. For if vpon the *fame* they bee called, then a *multitude* (as it were) teſtifieth againſt them. if vpon *Indicia*, Euidences, or *preſumptions*, the like is to be ſaid: becauſe theſe *are equiualent vnto a fame*, as hath beene touched before. And to ſatisfie them the more herein, the lawe requireth not vpon an *accuſation*; that the partie ſhould be *examined vpon his oath*, touching the *crime*. But they (becauſe they will be wayward, and ouerthwart in all things) pretend it to be lawfull in a court *eccleſiaſticall*, for a man (when there is a proſecutor, as in the *Starchamber*) to be put vnto his oath, for the trueth of the very *crime*: but not when it is *ex officio Iudicis*. which, if the law *eccleſiaſticall*, would warrant; the *Iudges* thereof might ſoone haue the *oathes* of theſe men, by their owne *poſition*, and graunt. For who knoweth not, how eaſie it were to enioyne any *officer* of the *Court*, or one of the *Commiſſioners* friends, or

ſeruants;

ſeruants; to preferre the matter, and to ſtand forth (as they terme it) *an accuſer?*

The two places remaining out of the 22. of *Exodus*, & the 5. of *Numbers*, I haue touched in the eleuenth chapter afore, ſhewing there, how they prooue, that a man may be examined vpon his owne oath, in a *criminall* cauſe, though there be no *witneſſe*, but a bare ſuſpition of the aduerſe *partie*. But that a man may in no other caſe beſides, be examined, where (perhaps) *witneſſe* may be had (which is their purpoſe in this place) there is no colour, nor ſhadowe in either of them: execpt they haue learned to reaſon out of euery ſingle place of Scripture, both *affirmatiuely* and *negatiuely* thus, viz. *This may be done in that caſe: and therefore, nothing elſe may be done.*

For the proofe of that ſecond poſition, viz. that *if a Magiſtrate doe require a Preacher to anſwere vpon his oath, touching any doctrine by him publikely deliuered, he may without breach of his duetie, lawfully refuſe to ſweare:* I doe ſee nothing further by them brought, that is worthie the anſwering. For whereas *Caluin*, and other *Diuines* ſay, that the vſe of *oathes* is vpon *neceſſitie*, and for matters *hidden*: it is not meant by *hidden*, that an oath cannot lawfully be giuen, where *witneſſes* may be had: but where the thing is neither *notoriouſly* apparant, nor *confeſſed* by the partie. For ſo long is it *hidden* to the *Iudge* who muſt proceede *ſecundum allegata, & probata*, otherwiſe, it would folow hereof, that an oath might not be giuen to a witneſſe, becauſe the matter is knowen, and not hidden vnto him. And for the *neceſſarie* cauſe of giuing it; what can be more neceſſarie, then the diſcouery & ſuppreſſing of *ſinnes*, and offences, both in *Church* and *Common wealth?* But theſe mens griefe is, that themſelues are not made the *Iudges*; whether the things they are to be examined of, be neceſſarie, and of importance to be declared. All that is ſpoken of the conuentings of *S. Paul* before ſeuerall *Magiſtrates*, in the [1] *Acts* of the *Apoſtles*, is ſpoken vnto afore, and no way fits this purpoſe. For where there be accuſers, there the *parties* oath, is not required. And yet *S. Paul* there, doth anſwer particularly; confeſſing ſomthing, and denying other ſome, of *doctrine*, and actions obiected. Neither is it to be thought, that he would ſay otherwiſe being not ſworn, then he would haue done, though he had bin ſworne.

[1] Act. capitibus 24, 25, 26.

Now whereas they ſay, that *to remoone euill from the land*, they will ſweare (though the ſinne be *ſecret*) but reſtreine it thus: *ſo it be not to drawe matter of accuſation and conuiction againſt themſelues, out of their confeſſion:* it is (in effect) as if they had ſayd, that in whatſoeuer cauſe *criminall*, and penal to themſelues, they wil take none oath at all. except they meane that *mala quia prohibita*, be no ſuch *euils*, as are to be diſcouered or *remooued at all from the land.* And according vnto this interpretation; their ſeuen reaſons (being all that I haue hitherto happened of) doe indiſtinctly tend. Firſt, they ſay, it is an approued *maxima* of the lawe: *Nemo tenetur ſeipſum accuſare vel prodere; ſiue propriam turpitudinem reuelare.* But I haue [1] ſhewed afore by true diſtinction (out of the ſame law, whence this is drawen) that it is to bee vnderſtood in crimes *ſimply ſecret*, and which are no way diſcloſed, or come to light. For when thoſe that were *ſecret* afore, by ſome of thoſe wayes (that doe open a way to an *enquirie*, of a perſon ſuppoſed *criminous*) are come abroad, and ſo (in ſome ſorte) are manifeſted: then thoſe former rules, and that of *Chryſoſtome*, [2] *Non tibi dico vt te prodas in publicum, neque apud alium accuſes*, hath no further place. for then the law ſaith; *Sic proditus, tenetur ſeipſum oſtendere, & ſuam innocentiam purgare.* and this is for auoyding of *ſcandall*, and that the partie may be reformed.

1 Cap. 9. 3. part.

2 Chryſ. hom. 31. ad Hebræos.

Therefore doth *Aquinas* himſelfe very grauely reſolue thus: [3] *Cum quis* (ſaith he) *ſecundum ordinem iuris, à iudice interrogatur, non ipſe ſe prodit, ſed ab alio proditur: dum ei neceſſitas reſpondendi imponitur per eum, cui obedire tenetur.* And againe, very pertinently to this purpoſe, of giuing & taking an oath: *Quicunque facit contra debitum iuſtitiæ, peccat: ſed pertinet ad debitum iuſtitiæ, vt quis ſuo ſuperiori obediat in iis, quæ exigit, ſecundum formam Iuris.*

3 Thom. 2. 2.

This diſtinction of the ſaid rule, is ſtrongly confirmed by that, which is alledged of the *oath* of *Ielouſie*, and of him which is *depoſitarius* in the law of God, handled in the eleuenth Chapter afore. For if they that be bewrayed by the onely (perhaps) vaine ſuſpition of another *partie* pretending griefe; muſt vnder-goe ſo ſtrait a courſe of *purgation*, or elſe *bewray themſelues*, to their apparant *ſhame*, and *diſhoneſtie*, beſides the grieuouſneſſe of the puniſhment: how much more then is it equall; that thoſe, who by *fame*, or vehement *preſumption*, or ſuch like ariſen; are diſcouered

to

to the *Magiſtrate*; and by him (not for any priuate ſatisfaction, but for the publike good and *benefit* of the *Church*) are vrged to ſuch *oath*, and for their owne reformation: ſhould either take it, or elſe (according to thoſe examples, and to all good lawes) be reputed *conuicted*, by their owne *implied confeſſions*?

To this poynt, is that not impertinent, which is alledged by [1] *Gratian* out of an ancient Father: *Taciturnitas peccati, ex ſuperbia naſcitur cordis: ideo enim peccatum ſuum quiſque celare deſiderat, ne iniquitas ſua, alijs manifeſta fiat: ne talis reputetur apud homines foris, qualem ſe, iamdudum exhibuit diuino conſpectui.*

[1] De pœnitentia. diſt. 1. c. quia aliquando in fine.

Their other ſixe reaſons to this purpoſe (I aſſure you) I doe bluſh (in their behalfe) once to mention them: they are ſo childiſh, ſo vaine, and flaſhie. the very rehearſing of them doth carie a ſufficient confutation, and anſwere on his backe: as that, *he which is put to this oath, is bound to proone a Negatiue, againſt law:* that *it doth peruert the ende of the Ciuill lawe, which is to be ſafe:* belike, they meane the laſt law of the *twelue tables: Salus reipub. ſuprema lex eſto.* that *it transferreth the glorie of God vnto man, by ſearching mens conſciences:* that *it is contrary to the equitie of Gods lawe, in that witneſſes ſhould ſtand forth, and not he accuſe himſelfe.* this is *coincident* with the firſt of the ſeuen. that *it is of the nature of auricular confeſſion:* that *it is a nowriſher of ſclanderous perſons, becauſe not the ſclanderer, but the partie accuſed, muſt take his oath.* If the reaſons hereupon to be framed were to be put into forme of *Syllogiſmes*; then theſe propoſitions muſt be vſed for *aſſumptions*, but they are not onely very vntrue, and to bee denied; but are not at all prooued by their *Proſyllogiſmes*, or reaſons; which are ioyned vnto them; to vpholde, and vnderproppe them.

So that to conclude this maine poynt of *miniſtring oath* to a *defendant* touching his owne *crime* or *offence*: theſe their foure opinions againſt this kinde of *oath* are neither reaſonable; nor their, or any others reaſons vſed againſt it, are of any force or weight; and therefore, though no further confirmation had beene vſed by vs; ſuch oath would haue beene *iuſtifiable*: which is nowe (as you haue heard) otherwiſe alſo manifoldly approoued.

CHAP. XIIII.

That a man being charged by authority to diſcouer his knowledge touching ſome offence which his Chriſtiã brother is ſuppoſed to haue done, is bound to reueale it, though it may breede trouble, and puniſhment to his brother. and the reaſons to the cõtrary are anſwered, & refuted.

IN the generall diſtribution made in the *Preface* before the ſecond part, for matters after to be handled; and which are challenged of vnlawfulneſſe, or of *impietie* by the *Innouators:* I there noted; that fault is found by them, not only becauſe oathes be giuen (in *criminall* cauſes) vnto the *parties* themſelues: but becauſe they are *examined* as *witneſſes* alſo, touching other their complices, and brethrens actions. This their *challenge* is made, in this reſpect: for that it is ſought (they ſay) by vertue of their oath, to *draw out* of them, ſuch their brethrens actions; as albeit the *lawes of the Realme*, and thoſe who are their *Iudges*, doe holde to be *crimes*, and offences, and minde to puniſh them in that qualitie; yet they who are to be *examined*, are perſwaded; that they are well, and commendably done, whether by thẽſelues, or any other their brethren. And therfore they doe thinke, that they are bound in *conſcience*, not to take an *oath*; wherby they may be tied to ſo vngodly a diſcouery of their brethrens *good actions*, whereby they ſhal bring them to trouble, or puniſhment. For if they were offences, and *crimes*, then (ſay ſome of them) *to remoone euill from the land*, they would be ready to reueale them vpon their *oath*. but being, as they take them to be, (whatſoeuer other men do) by no meanes they may diſcouer them. And this point is now by moſt of them (that ſeeme to be of any ſkill) chiefly reſted vpon (letting other more eaſily goe) albeit they deliuer it abroad charily, and ſomewhat fearfully. But the abſurdities, and inconſequence of this opinion; I haue ſomewhat alſo (by occaſion) touched, in the 13. Chapter of this part.

Howſoeuer it is now newly taken vp, and an opinion, which they greatly pleaſe themſelues in: yet did the Fathers in the *Primitiue Church* condemne it for erroneous, and the practiſe of it, as vngodly. *Both are* [1] *guiltie* (ſaith *S. Auguſtine*) *that is aſwell he which hideth the trueth, as he which telleth an vntrueth: becauſe the firſt of theſe will do no good, the other ſeeketh to do hurt.* So that theſe

[1] Auguſtin. ad Caſulanum.

two

two are matched together by him, as being not much vnlike. A ſufficient reaſon hereof in *crimes*, may bee taken from thoſe [1] wordes of the *Apoſtle*, where he ſaith: *Euill men, and ſeducers will goe forward from worſe to worſe, both continuing in error themſelues, and leading others into it.* And therefore their wickednes, is meete to be diſcouered; that ỹ miſchiefe may be preuented. But to this it will be ſaide, that the caſe is put, and the controuerſie is made, onely where ỹ parties to be examined, do not thinke ſuch their brethrens actions, & practiſes to be *euil*, or their opiniõs *erroneous*: howſoeuer the *Magiſtrates* do otherwiſe cõceiue of thẽ.

[1] 2. Timoth. ca. 3. v. 13.

Let vs therefore cõſider, what is to be thought, & determined concerning the bewraying of our complices and friendes, about matter of *hereſie*, and *errour in faith*. In which *crime* of all other, ſuch as knowe their *hereſies*, & ioyne therein with thẽ; are moſt reſolutely perſwaded, their cauſe to be paſſing good. Neuertheleſſe, if this crime alſo ought to be diſcouered & manifeſted, then much more are all other ſortes of criminous perſons, eſpecially when (in ſome ſorte) they be diſcouered before, vnto the *Magiſtrate*. S. [2] *Iames* ſaith: *let him know, that he which cõuerteth a ſinner from his erroneous way, viz.* being afore *ſeduced from* [3] *the trueth; he ſaues that ſoule from death, and ſhall couer a multitude of ſinnes.* This *couering of ſinnes* is no merit of the *conuerters*; as if his ſinnes were thereby to be wiped away in the ſight of God; as the Papiſtes haue dreamed: but it is the *hiding* & *couering* of the *ſinnes* of him, who is *conuerted*. That this is the true ſenſe of the place, appeareth by the circumſtance of *Salomons* wordes, from whom ỹ *phraſe* is borrowed: *hatred* (ſaith he) [4] *ſtirreth vp ſtrife, but charitie couereth a multitude of ſinnes*: euen ſo farre as with a good conſcience may be done, as *Tremellius* noteth. If then vpon a ſeduced mans cõuerſion, a multitude of his ſinnes are kept *hidden* by him, who conuerted him: it wil followe, that if he be not *conuerted*, but ſtill goe on in his error, ſuch his ſinnes may; yea, and ought to be manifeſted abroad, and diſcouered. Therefore much more, when (in ſome degree) they are before reuealed vnto the *Magiſtrate*, that makes the *Inquirie*.

[2] Iacob. ca. 5. v. 20.
[3] Ibid. v. 19.
[4] Prou. ca. 10. v. 12.

Nay, a perſwaſion vnto *Idolatrie* (which is a kinde of *hereſie*, & alſo is a putting of it in practiſe) we haue an expreſſe commandement of God, voluntarily & of our ſelues to reueale it, how ſecretly, or by how deare a friend ſoeuer it be committed, or we

by him intiſed vnto it. *If thy* [1] *brother the ſonne of thy mother, do ſecretly entiſe thee; or if thine owne ſonne or thy daughter, or thy wife, that lyeth in thy boſome, or thy friend, which is to thee as thine owne ſelfe: ſaying, let vs goe and worſhip other gods, &c. thou ſhalt not conſent vnto him, nor heare him; neither ſhall thine eye pitie him, nor ſhewe him mercie, nor thou ſhalt not keepe him ſecret.* Where, albeit we be commanded not to conſent vnto ſuch ſeduction: yet is that other parte of the precept of not *concealing him*, ſimple, and abſolute in it ſelfe; and without any diſtinction, whether the partie intiſed, take holde of the perſwaſion, or not. For ſhall not the *concealing*, be aſwel a ſinne to him that yeeldeth vnto the ſeduction, as it is to him who reſiſteth it?

[1] Deut. 13. v. 6. 7. 8.

Saint Auguſtine ſayeth: *let* [2] *vs then, and not before, truſt an heretique, who deſireth to be receaued vpon his repentance: when he ſhall be content to reueale vnto vs, ſuch other; as he knoweth to bee of the ſame opinion.* Therefore to diſcouer their ſecret complices, was by him holden to be no ſinne, nor yet performance of any bad office. *S. Chryſoſtome* to the ſame effect [3] ſaith: *This is the office of an eſpeciall wiſe minde, not to reuenge his owne, but to proſecute mightily the iniuries done to God.* And elſe where [4] more fully: *let vs learne* (ſaith he) *by Chriſtes example, courageouſly to beare the iniuries that are done to our ſelues: but not to endure ſo much as the hearing of iniuries done to God. For it is commendable to be patient in our owne iniuries: but to diſſemble the iniuries which are done to God, is vngodly and wicked.*

[2] Aug. ep. 74. ad Deuterium.

[3] Chryſoſt. in pſal. 5.

[4] Chryſoſt. hom. 5. in opere imperf.

Leo the great, an ancient Biſhop *of Rome*, thus exhorteth men to the reueiling of *heretiques*: [5] *whereſoeuer the Manichees do hide themſelues, ſhewe it vnto your prieſtes: for it is a great part of godlines, to bewraye the lurking places of the wicked, and to vanquiſh the deuill himſelfe, in thoſe who ſerue him.* And the ſame Father [6] elſe-where more fully: *Dearely beloued, I beſeech and warne you, that if any of you doe know where any heretiques doe dwell, where they teache, whoſe companie they frequent, and in whoſe ſocietie they are delighted; that you would truely ſhewe it vnto me, who am moſt carefull hereof.* And further a litle after: *Thoſe who thinke ſuch are not to be bewrayed, are to feare; leaſt at the Iudgement daye of Chriſt, they be holden guiltie by reaſon of their ſilence, yea albeit they be not defiled with aſſenting vnto them.*

[5] Leo magnus ſer. 4. de collectis.

[6] Idem. ſerm 4. de ieiunio decimi menſis.

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The ſame, which he taught by doctrine, he alſo [1] put in vre, by his practiſe: for it is reported of him, that *when Paternus, & Maximus were Conſuls; by the carefull diligence of the ſaid Leo, it was brought to light; that many Manichees lurked priuily in the Citie: Who bringing them forth of their ſecrete corners into the publicke ſight of all the Church; he made them both reueale all their foule opinions, and alſo to condemne or abiure them: and withall he burned their bookes, whereof great quantities were taken. It ſeemeth that this care of that holy man, was inſpired into him from God; for it did much good, not onely in Rome, but throughout the whole world. Inſomuch as by the confeſſions of ſuch as were apprehended in Rome; it was made manifeſt, what doctors or teachers, what Biſhoppes and what Prieſtes thoſe of that ſect had, and in what prouinces and Cities they were. And many Biſhops of the Eaſt partes followed this carefull, and good example of this Apoſtolique Biſhop.* For as [2] *Thomas* ſayeth; *By the very lawe of charitie, the good of religion is alwayes to be preferred, aboue the fame, yea, or the verie liues of the wicked.*

[1] Proſper. Aquitan. in Chronico.

[2] Thom. Aqui. 2. 2. q. 33. art. 7.

[3] *Plato* but an heathen *Philoſopher*, thought good to tye, all in his common-wealth vnto this lawe: viz. *If any man deale impiouſly or vngodly, either by wordes, or deedes; let him that is preſent ſtand in defence of Gods cauſe, and alſo relate it vnto the Magiſtrates.*

[3] Plato. li. 10. de legibus.

Saint Hierome [4] requireth of all *humble Chriſtians*, this dutie, of reueling, not onely *hereſies*, and *erroneous opinions* of other men; but alſo other offences. *thoſe* (ſaith he) *are truely wiſe in Chriſt, who being conuerted vnto God, doe faithfully confeſſe, and doe by publique repentance ſatiſſie* the Church, *whether for their ſinnes or their hereſies: and who not onely doe this, but alſo diſcouer thoſe, that are meanes to bring them into thoſe crimes, or erroneous opinions.*

[4] Hierom. in 15. cap. Iob.

I haue not hitherto heard of any, beſides certaine *heretiques*; who at any time helde the like opinion vnto this of the *Innouatours*, and factious perſons in this Church. *Saint Auguſtine* reporteth, that the olde [5] *heretiques* called *Priſcillianiſtæ*, *did teache their ſchollers, not to reueale the doctrine which they learned, yea though they were examined thereof vpon their oathes. affirming withall, that* rather then faile,

[5] Auguſt. in lib. de hæreſibus.

it were better to be forsworne, then to *discouer it: And therefore this saying was rife in their mouthes; Iura, periura, secretáque prodere noli: Sweare* (saye they) *yea and forsweare your selues too, rather then reueale these secrets.* This *heresie* was also afterwarde holden, by an [1] other sorte of *heretiques*, in the time of *Bernard*, that were termed *Apostolici*. And by certaine other (as it is written) that were called *Flagellantes*. where (by the way) wee may obserue, that none in those dayes had learned absolutely to refuse an oathe in a matter made by the Examiners criminous vnto the parties examined; or yet to their complices, and brethren. But for not reuealing their owne, or their brethrens secrets, those *heretiques* of olde time had learned perfitly ynough to conceale the trueth; yea, albeit they incurred flatte periurie, by such their concealement or deniall of the trueth.

[1] Bernard. Serm. 65. & 66. in cantic-cum.

I wil now assaye, to answere the reasons, which I haue heard brought, for ỹ establishing of this their conceipt. But first I must put you in minde, how vnreasonable, & incóueniēt it is to be accoũted, in al practise of lawes. For whē the defendāt hath denyed a *crime* obiected, or refused to answere yea or nay, if it might be free (for all ỹ by likelyhood can testifie thereof) to make such pretense, to ỹ intent to excuse thēselues frō that *necessarie* dutie vnto ỹ *commō-wealth*; what *criminous* person could, or were likely to bee euer directly conuicted? whereas, (by the *ciuil* [2] lawes) sometimes, *he that is supposed to haue appointed the delinquent to doe the facte; he that is his suretie; he that is called into question for the same crime; he that is fellowe, or familiar with the suspected person, may be compelled to sweare & depose of a crime.* By the cōmon law, if such (as are supposed can giue euidēce for the *Queene*) should not oftentimes bee compelled thereunto by authoritie; would there not (in many causes) want due proofe, for iusticeing and for execution of offenders? But to this it is said, that men are but bounde in an obligation or recognizance to prosecute the felonie. It is true: what other bond shoulde any man enter for his apparance? But if hee refuse that, may he not be sent to the gaole himselfe? And when hee commeth before the *Iudges*, hee is bounde also by a *necessarie oathe*, to giue true euidence (to the vtmost of his knowledge) against the prisoner, or person to be tried. Which, if he shall refuse; he is like to stand in boltes with

[2] l. 6. § 4. C. de his qui ad eccles. confugiunt.

with him, whoſe fault he mindeth to conceile, as hee well deſerueth: and happely may be condemned to pay a rounde *fine* beſides, for his notorious *contempt*, and for *abbetting* of offenders, in their lewdnes.

If it be ſaid (as ſome haue obiected) that it is not amiſſe to certifie, ſo the partie bee willing: but that it is hard to bind him (vpon his *oath*) to teſtifie, whatſoeuer he knoweth againſt the *defendant*, touching that matter: truely I cannot geſſe whereunto this ſpeach may tend; except *witneſſes* might ſay what, and how little they liſt of the *trueth*; or els that they would haue mens words to be beleeued againſt others (to their cõuiction) without any *oath*. But what matter can be *confirmed* without *oathe* in any outward actions of men, not knowen by ſome *ſenſe* vnto ỹ *Iudge*? it is the law of *nature* and *nations*, to beleeue no man againſt another, without an *oath*. For why ſhould not any mans bare denial for his owne clearing; bee as ſtrong as many other mens bare words, for his *condemnation? quia proniores eſſe debemus ad abſolue-dũ quàm ad cõdemnandũ*. Therefore the *holy Ghoſt* noting it to be a law of *nations*, that no mans word (vnſworne) ſhould be receiued, thus teſtifieth; that *an* [1] *oath for confirmation, is amongs men indefinitely*, & therefore moſt *vniuerſally, an end of all ſtrife*. [1] Heb.6.v.16.

It is [2] told as a maruaile of one (only) amongs ỹ heathẽ, named *Zenocrates*, for whoſe bare word, the *Athenians* (by a lawe) decreed; that it ſhould be holden of as great force as his oath, in all matters: ſuch was his rare and ſingular vprightneſſe, & integritie. [2] Alex. ab Alex. Gen. Dierum. Lib.5.cap.10.

Touching their reaſons, I make this to be the firſt, as moſt *generall*: *viz. Becauſe they haue not iuſtly incurred the* Magiſtrates *diſpleaſure by any offence, therfore they cannot hold themſelues bound in conſcience, to be the Magiſtrates inſtruments againſt ſuch; as be none offendours.* To which may be added, that *they are bound to ſeeke rather the deliuerance of the Innocent, becauſe it is ſaid:* [3] *Deliuer them that are draweu to death: and wilt thou not preſerue them, that are led to be ſlaine?* And it is noted as a ſinne in *S. Paul himſelfe, that he* [4] *ſtoode by, conſented to Stenens death, and kept the clothes of them that ſlue him.* [3] Prouerb.24. ver.11. [4] Actes 22.v.20.

As if they ſhould ſay, We haue gone (in this matter) as farre as our brethren; we know our courſe to be good, whatſoeuer the lawes or the *Magiſtrates* determine or thinke to the contrary;

that doe but ſeeke to puniſh vs for it. And ſeeing we are ſo well perſwaded of all our *innocencies*, we may not be any *inſtruments* of our owne or their further detection: for this were to conſent, to haue guiltleſſe men puniſhed. But is not this to take vpon thē (being but *witneſſes* of the fact) to iudge alſo, of the lawe, what it ought to be, and to condemne it as it is? and is it not (in effect) aſmuch, as to condemne the *lawes* of *vniuſtice*, and the *magiſtrats* of *tyrannie*, *perſecution*, and of ſeeking the vexation of *innocents*?

But if the lawes were ſuch, yet (at the commandement of the *magiſtrate*) to tell the particulars of theſe their actions, ſo iuſtifiable (as they thinke) whereof the *Magiſtrates* already knowe the generalitie; is not to conſent, vnto the puniſhment of innocents. Doth euery one that confeſſeth his owne crime, & *pleadeth guiltie* in a cauſe *capitall*, conſent to his owne death, or is thereby *giltie* of his owne blood? then why is he more conſenting or guiltie to their puniſhing (due by lawe for theſe actions) who onely declareth them truely as they are; more thē he that *confeſſeth* (being in deed guiltie) may be ſaid to be *guiltie* of his owne death? It is a ſubiects dutie (moſt eſpecially in cauſes not *capital* to himſelfe) if he be required by authoritie; not to dallie, nor to lie vnto the *Magiſtrate*, but to tell the fact truely as it was; whomſoeuer beſides, it may concerne. Now, if thereupon, either the *Magiſtrate* puniſh it where he ought not, or more grieuouſly then law permitteth; or if the lawe puniſh that as a *crime*, which is a *vertue* the fault and guilt before God is not in them that declare the trueth, but either in the *Iudges*, or in the *lawe*.

Nay, to enforce this point a little further; I would aske this queſtion of euery of thē that be of ỳ ſide: A man being of neceſſitie to plead either *guiltie*, or *not guiltie* to a *crime capital* vnto him, or els to be preſſed to death; if he be guiltie of the fact, and yet (happely) he knoweth there can be no pregnant (no nor any likely) euidence brought againſt him: whether *in foro conſcientiæ*, without any ſinne, may ſuch a man pleade not *guiltie* vnto the matter of inditement? for the *time*, *place*, and other *wordes of fourme and courſe*, are not trauerſable. on the other ſide, if (in this caſe) hee pleade *guiltie* (being ſo in deede) whether is he (thereby) guiltie of his owne death, or not?

But if for auoyding of ſinne before God, ſuch one ought (in conſcience) to plead *guiltie*, rather then lye; and yet ſhall not (thereby)

(thereby) be made guiltie of his owne death: why ſhall ỳ *declaring of the trueth*, touching other mens actiõs, make him ỳ reuealeth it (being charged thereunto) guiltie or cõſenting vnto their puniſhmẽts, how vniuſt ſoeuer (otherwiſe) they might be ſurmiſed to be? for if any mans faults may be ſpared, a man might moſt lawfully ſpare himſelfe: *quia Ordinaria charitas incipit à ſeipſa.*

And to preſſe this reaſon (*à Paribus* at leaſt, if not *à fortiori*) a little further: If ſuch a man ſhoulde chuſe rather to be preſſed to death for ſtanding wilfully mute, and not anſwering directly vnto either; ſhould he not *de iure poli* (euen in true termes of *Diuinitie*) be accounted guiltie of his owne death, & to be (in the ſight of God) a *murderer* of himſelfe? the very like therefore is to bee iudged of theſe perſons, viz. that their *puniſhment* (as cõuicted of the *crime*) is moſt iuſt; that their blood is vpon their owne heads; & that none are cauſes of ỳ puniſhment inflicted vpon them, but themſelues; for ſtanding obſtinately *mute*, without direct anſwering (in fourme of lawe) as they ought: though it were admitted, that ſuch their actions, whereof they bee interrogated, were all good, and they innocents.

And as the reuealing of other mens actions (when we are duly charged) maketh vs not guiltie, or conſenting to their puniſhment: ſo our refuſing to anſwere, neither is any meanes (in deed) nor yet is ſo appointed of God, to ſerue for their deliuerãce. For God wil not allowe to haue *innocents* deliuered, by our *diſobedience* to his *Lieutenãts* on earth; nor by concealemẽt of any trueth, expedient to be knowen, & (according to law) commanded to be declared. And therefore ỳ place of the *Prouerbes* by thẽ brought, fitteth not this purpoſe. For if they for their *obedience* ſake, with a ſingle heart & without intent to hurt the *innocent*, and being charged; ſhall deliuer but the very plaine trueth (how vniuſtly ſoeuer the *magiſtrate* may ſeeme to deale afterward) yet ſhal not the diſcouerer of the trueth, bee a partaker of the *magiſtrates* ſinne. For it is but *he* [1] *which imagineth to doe euil, whoome men ſhall call an authour of wickedneſſe*, as is recorded in the ſame *Chapter*. [1] Prouerb. 24. ver. 8.

The other place out of ỳ *Acts* is nothing like to ỳ matter & caſe, that we haue in hand. For *Paul* was not there charged by autoritie, to bewray any thing he knewe againſt *Stenen*, much leſſe to deale at all in that action. But hee (willingly) as one forwarde

of himselfe and of a malice against the very profession (which he then detested) did thrust himselfe into the cause, and rather then he would not be some stickler in it; he thought good to do some *office of kindenes* vnto the torme̅ters & executioners of that holy *Martyr*, though it were but by keeping their clothes: & thereby he directly, gaue approbation and consent, vnto *Stevens* death. Yea, this their opinion is without any other like example in any text of *Scripture*; except perhappes they will gather it from an *observation* and note pretended to be collected from the next Chapter following. For I finde an opinion collected thence, which iumpeth with theirs, in this behalfe. [1] *If thou bee put to an oathe* (saith that note) *to accuse Catholikes for serving God as they ought to doe; or to vtter any innocent man vnto Gods enemies and his: thou oughtest first to refuse such vnlawfull oathes. But if thou haue not constancie and courage so to doe, yet knowe thou that such oathes binde not at all in conscience, and lawe of God: but may and must be broken, vnder paine of damnation.*

[1] Rhemish Testament, in annotat. cap. 23. Act. Apost. ver. 12.

T. C. They will not confesse, that they haue sucked this opinion from hence: and they may not be endured to flappe vs out with their olde dogge tricke; and to say *they borrowed it not of the Papistes, but obserued so much themselues, by reading of the Bible*. For this were both to iustifie their owne; and with-all, this corrupt doctrine of the *Iesuites*, as if they both (so well agreeing together) were arightly grounded vpon the *worde of God*.

But they bring seuerall places and examples, whereby they thinke this is prooued. The *officers* of the children of *Israel*, that were appointed by *Pharaohs* taske-masters, to looke; that the people shoulde make as much Bricke by day (and gather the strawe themselues) as they did when strawe was found to their handes; seeing that the people were not able to perfourme it, and yet were beaten for not doing it; did signifie the impossibilitie & vnreasonablenes of this, vnto the *king*. But the king gaue them a resoluto answere; that they shoulde doe it; vpbraiding them, that it was but idlenesse, which made them pretend, that they would goe to offer sacrifice vnto their God. Which thing was the ground of *Moyses* and *Aarons* suite vnto him, that the people might haue leaue, to goe into the wildernesse. So when these *officers* comming with this hard answere from the king; did meete

meete with *Moyſes* and *Aaron*, they expoſtulated thus with them: *Ye* [1] *haue made our ſauour to ſtinke before Pharaoh and his ſeruants, in that ye haue put a ſword in their hands to ſlay vs:* meaning that their ſute for going forth *to ſacrifice*, did ſo diſcontent the *king*; that he would (in that reſpect) oppreſſe them, euen vnto *death*. [1] Exod. 5. ver. 21.

But what is this to purpoſe? doth this phraſe *of putting a ſword into another mans hand* ſo pleaſe theſe men, that they will imagine; by what occaſion ſoeuer a wicked man pickes quarell to oppreſſe Gods children; that ſuch a thing, whereupon the occaſion is taken (of neceſſitie) is vnlawfull to be done? from the beſt actions of godly men, tyrants will oftentimes take occaſion, to perſecute the whole Church. ſhall therefore all exerciſes of religion be intermitted?

Euen in this place, the meſſage that *Moyſes* and *Aaron* brought to *Pharaoh* (which occaſioned ſuch oppreſſion to the children of *Iſrael*) was put in their mouthes by the Lord. And therfore they ſinned not, albeit this was like to haue turned to be *as a ſword*, to deſtroy vp all the children of *Iſrael:* but rather theſe *officers* did offend, that thus did mutine and grudge againſt thoſe, who fulfilled *Gods cõmandement*, and did but as they ought to do. Euen ſo ſhall they offend likewiſe, that ſhall be diſpleaſed with ſuch, as doe what they are lawfully commanded; albeit trouble and puniſhment by that occaſion ſhal happen vnto them, that ſo take offence. So that this example doth make flat againſt their owne purpoſe and intention, and can no way helpe them.

Another example they bring, of [2] *Obadiah*: who hid 100. Prophets in two caues ſecretly, and ſuſteined them with neceſſaries, when *Ieſabel* ſlewe the other *Prophets*, whom ſhe could hit vpon. [2] 1. Reg. 18. ver. 4, 13.

But this commeth farre ſhort of the purpoſe, for which it is brought. For who euer denied it to be lawfull to ſhewe *charitie* vnto the *Lords Prophets?* then, there appeareth no commaundement to the contrary, but that he might receiue them. againe, it doth not appeare, that he was euer (by authoritie) charged to reueile them; or to tel his knowledge what was become of thoſe *Prophets:* and therefore it is vnlike to the caſe in handling. furthermore, it was (wholly) an vniuſt, wilfull, and tyrannous perſecution, without warrant of law, or colour of any iudiciall proceeding. beſides, if he had bene charged by *Ieſabel* to diſcouer

where they were, or had beene commaunded by her to relieue none such; yet had it bene no disobedience towards the *Magistrate*. for it is not noted to be the doings of the king, but that *Iesabel* slew them. Now, the *kings wife* is no *soueraigne*; but a subiect her selfe. Moreouer the killing of the *Prophets*, for no pretence or colour of cause at all; is in it selfe so apparant an *euill*, as no man can haue any shadow, to giue a lawfull consent vnto it. Lastly, a man cannot gather a *generall doctrine* (in a matter doubtfull, and not plainely deliuered els where in *Scripture*) out of any particular mans fact: becaus all the circumstances which then fell out, are not knowen. But most especially, an *example* can neuer serue to the ouerthrow of the generall commandement, *of obeying the Magistrate*. And, *viuendum est legibus, non exemplis*.

1.Sam.19. ver.1,2. Out of the first booke of *Samuel*, they bring three other examples. The first, that *Saul spake to Ionathan his sonne and to all his seruants, that they should kill Dauid: but Ionathan Sauls sonne, had a great fauour vnto Dauid, and bade him take heede* &c. The

1.Sam.20. ver.31.& 32. second, *when Saul said to Ionathan: Send and fetch Dauid vnto me, for he shall surely die: Ionathan answered, Wherefore shall hee die? What hath he done?* the third, that *when Saul commanded his*

1.Sam.22. ver.17. *seruants to fall vpon the Priests of the Lord, & to slay them; they would not mone their hands, to fall vpon the Priests of the Lord.*

To these three, one answere may serue, and therfore they are thus set together. First, these commandements (though of the *king*) yet they were, when he was enraged and in a furie; after the Lord was departed from him, & an euil spirit was come vpon him. Againe, it is apparantly vngodly in it self for any to kill an *Innocent*, vpon the tyrannous and vnaduised commandement of the *king*; euen without all colour of any lawful *Iudiciall* course. Lastly, *Dauid* was knowen vnto them, to be afore appoynted, yea, & their *annointed* king from the Lord; howsoeuer *Saul* was tolerated *de facto* to continue in place: till the measure of his iniquitie was fulfilled. And therfore (in this respect) was it vnlawful to kil, either him, or those that fauoured him; especially the *Lords*

Ibid, ver, 18. *Priests*: whose *linnen Ephod* should be a protection vnto them, against al such precipitate executions: where neither conisance of their cause, nor any due *conuiction and iudgement*, was precedent.

Another example they bring, of the midwiues of the *Israelites*,

to

to proue their intention. It is thus written, *they feared God, and did not as the king of Egypt commanded them, but preserued (aliue) the men children.* Exod. 1. ver. 17.

This obiection carrieth his answere with him. For it is said, *they feared God, & therefore did not herein, as the king cõmanded:* noting vnto vs, that the cõmandement was such, as could no way stand with the *feare of God.* There is no *Prince* in the world to bee obeyed, when he commaundeth any thing directly forbidden by God: for *it is better to obey God then man.* The Prince is no *God*, nor yet Gods Lieutenant, but a meere man; in that which he cõmandeth directly contrary to God. That this was of that kinde, it appeareth: for *to kil*, is (manifestly) by *ỳ moral* lawe of *God & nature*, forbidden. Yet this hath his exception: viz. that it is no *murder*, when we execute the penaltie of lawe, vpon murderers & other wicked persons, duely conuicted & condemned. For *he that sheddeth mans blood, his blood shall be shed by man*, saith the Lord. Gene. 9. ver. 6. But there could be no colour or apparance of any *actual* wickednesse in children newly borne, why they should be executed: being but by a generall iudgement condemned most wickedly and tyrannously; euen before they were. *non censetur existere* (saith the law) *qui adhuc est in vtero matris.*

Now let vs compare these last foure examples, with the scope and purpose, for which they are vsed. The very act of *murdering* a person notoriously *innocent*, in that he is neither *conuicted*, nor condemned, is *malum per se*: a thing simply and absolutely in his owne nature *euill*, without any further circumstance. But to declare what a man knoweth to be done by another; the very *authours* themselues of this opinion, must needes confesse to bee sometimes lawfull and requisit: and therefore they must at least graunt it to be *medius Actus*: such as (by circumstance) may be lawfull; howsoeuer by the circumstances of this case (as it is propounded) they will (perhaps) hold it vnlawfull. And therefore there is such dissimilitude and diuersitie betwixt these examples, and that which they holde; as they can neuer serue this purpose.

Therefore to fit their turne, in the very poynt of the issue, they must proue vnto vs: that it is vngodly, for any man (though charged by *lawfull authoritie*) to declare his knowledge of another mans actions; if hee that is vrged so to make declaration,

doe iudge afore-hand; that the *Magistrate* mindes to punish such action, either where he ought not at all, or in other sort, then *Gods* law permitteth.

[1] Iosh. 2. ver. 3. & 4. For this purpose, they alledge as strongest, the example [1] of *Rahab*: who would not tell the king of *Iericho*, where the two spies of *Israel* were; though she were by him *commanded to bring them foorth*; and she is commended for it, by the [2] *holy Ghost*.

[2] Heb. 11. ver. 31.

In answere hereof I say: we reade not, that the king asked her, whether they were there still, or not; albeit shee [3] answered *that they went out*: but she was commanded to *bring them forth*; which is something more, then to tell where they were, if she had beene so asked.

[3] Iosu. 2. ver. 5.

Secondly, *by* [4] *faith* (vpon hearing the miracles that *God* had done, and wrought for the children of *Israel*) and by special reuelation; *Rahab knew*, that *God*, [5] *euen the God of heauen aboue, and earth beneath*, whose *the earth is, and the fulnesse thereof*, and who (according to his prouidence and wisedome) *doth transtate and establish kingdomes*, as it seemeth best to his diuine pleasure: had afore that, *giuen that whole* [6] *land, vnto the children of Israel*. So that in very right and trueth, she did owe no more obedience to the late *king* of *Iericho*; but was by *God* discharged thereof, and lawfully might (as she did) submit her selfe, & capitulate (for her safegard) with the embassadours of those; to whō (of very right) her subiection then belonged. and therefore could not (without sinne) haue betraied them, being sent frō *Iosbua* her lawful *soueraigne*; into the hands of an *vsurper*; whō she knew perfitely the Lord had deposed, & [7] meant soone after, to destroy accordingly.

[4] Heb. ibid. & Iosu ibid. V. 10.

[5] Ibid. ver. 11.

[6] Iosu. Ibid. V. 9.

[7] Ibid. ver. 13.

This interpretation is euidently & very strongly confirmed by that place of *Scripture*, where she is, for this, cōmended. *By* [8] *faith* (saith that place) *the harlot Rahab perished not* [illegible] *with the disobedient, when she had receiued the spies peaceably*. If then the rest of *Iericho* were *disobedient* (in respect of which, *Rahabs* obedience & peaceable receiuing of them are cōmended) & therfore they perished by the hand of *Iosbua* & the people: is it not manifest, that *Iosbua* was their *lawfull Magistrate* in right, and that they ought to haue taken knowledge thereof, and to haue *obeyed* him, at their owne perils?

[8] Hebr. ibid.

Lastly, there is in this fact something *extraordinarie*, as done

by

by *ſpeciall œconomy*, which, by vs may not ſafely be followed. As the lye that ſhee made, in [1] ſaying, *ſhee wiſt not whence they were, and that they went out in the euening*. And likewiſe, it is not to be preſumed by any *ſubiects* in theſe dayes (when as miraculous, and *ſpeciall reuelations* are ceaſed) to adiudge themſelues either wholly, or in ſome particular actions & circumſtances, to ſtand diſcharged of their *obedience* and *alegeance* towards their *Soueraigne* or *vndermagiſtrates*; when, and how farre, themſelues wil fanſie. For if by this and ſuch like *extraordinarie* examples (or by that of *Obadiahs* hiding of the hundred *Prophets*) ſuch preſumption were lawfull or tolerable: what a goodly colour might all diſobedient and rebellious ſubiects haue, namely vnnatural *fugitiues* ouer ſea, *Ieſuites, Seminarimen, recuſants, concealers* & *harberours* of theſe, and ſuch like boutifeux & bellowes of ſedition, for all their godleſſe attempts? are they not, or at leaſt will they not pretend, to be as aſſured and reſolute of the goodnes of their cauſe, as the *Diſciplinarians* are touching theirs, & their deſignements? ſo that for theſe men, that would be counted moſt ſincere *profeſſors of the Goſpel*, to holde the like dangerous *poſitions*, & to ſeeke to confirme them, with the ſame & no better reaſons and examples then the *Papiſts* doe theirs: for my part, I doe recken it to be the practiſe and part, neither of grounded and iudicious *Diuines*, nor of well aduiſed or duetifull ſubiects, *quorum veſtigijs inſiſtunt, eorundem exitus perhorreſcant*.

[1] Ioſ. 2. v. 4. & 5.

But they ſay further: that by ſuch oath, *they ſhould be drawen to diſcouer vnaduiſed ſpeeches, that ſometimes paſſe men in priuate fellowſhip, as at table &c. or ſuch as come vnto them for counſell, and for priuate reſolution of their conſciences*.

Firſt, there is no man bound to anſwere more matters then be conteined in the *Article* or *Interrogatorie*, whereof he is *examined*. But if any matter be therein layde downe in ſuch ſort, as it leadeth (pertinently & directly) to ſuch diſcouerie: then is it likely, that by ſome meanes it is *detected* vnto the *Magiſtrate* afore, and by him thought expedient (for ſome neceſſarie publike cauſe) worthy of ſuch *Enquirie*. Againe, if ſuch priuate *talke* or *asking of counſell* haue bene cõcerning ſome platte or practiſe laid or to be laide, that ſhall (in diſcretion) be adiudged by the *Magiſtrate* expedient (for the common wealths ſake) to bee

knowen and discouered; and therefore if they *shall enquire* directly of it: I can not see, howe it may stand with any mans dutie to *God*, vnto the *Prince*, vnto *Lawes*, & to the *Common wealth* to conceale it, being charged to the contrary. But of other secret speeches, treaties, and resolutions of mens *consciences*; no *Magistrate* is of so slender *discretion*, as to *enquire*; nor can by lawe (though hee would) for want of those *indicia* and speciall *presumptions* and inducements that are required, to ground an *enquirie* vpon: and therefore this is but matter deuised, *ad concitandam & conflandam inuidiam*, against *lawfull authoritie*.

They alleage also, that by their discouerie, *some that be very poore may be vndone: and that the most of the matters and persons being already knowen vnto authoritie, there can be none vse for them to appeach any, but to alienate their mutuall affections, and to haue one another in ielousie*.

This is very loose & simple, to reason vpō a *casuall euent* which may happen, thereby to prooue a thing vnlawfull. for of a good matter, an ill *euent* may, and doeth often fall out, *& è conuerso*. *Careat successibus opto, quisquis ab euentis facta notãda putat*, could the very *heathē Poet* say. And why should a mā withdraw his duty to *Magistrates*, onely for particular & priuate respects touching himselfe, and some few other priuate persons? Whatsoeuer may *happen*, let him doe as he ought: *Fiat iustitia, & ruat mundus*.

Particularly to the first, why should any man pitie his pouertie, that pitieth not himself, but wilfully runneth into dāger of lawes? & shal a man holde a poore man more deare vnto him, then the common quiet & peace of the *Church* and *Common wealth* both?

The second part implieth a *contradiction* in it selfe: for if the matters and persons were sufficiently knowen; then (in trueth) were it of no vse, for the *Magistrate* to *enquire* further. yet if they be so knowen already, then what wilfulnesse is it in these men, thus obstinately to persist to their owne hurt, and yet to doe others no good thereby?

They obiect further, that to discouer their brothers secrets, is condemned as a fault, by the *Holy ghost*: for [1] *he that goeth about as a slanderer, discouereth a secret, but he that is of a faithfull heart concealeth a matter. And seeing they haue met in some mens houses that did it for good affection and opinion vnto them; if they should discouer*

[1] Prou. 11. v. 13.

couer such, it were a very vnthankefull requitall (they say) *towardes them. And for that their felowship is in the trueth, & the course they walke holy, therefore* (*euen by the law of loue and felowship*) *they may not detect one another: for that were a note of a false brother.*

As for the trueth of the matters that *they meete about*, & the *holines of the course they walke*, it is not of this place to discusse: how *holy* and *true* soeuer it is, it dare not looke out at noone dayes: and yet we liue in a state *professing the Gospel. Num sic Apostoli? num sic Martyres, &c?* but ỹ more *true* & *holy* it is, the lesse ought they to be ashamed to reuoile it (being called into question for it) as is signified afore. Here (we see) that the *law of their loue and felowship, and its hospitale*, towards such their priuate friends, as haue receiued them; is by them, more esteemed & accounted of; then either the *publike lawes* and *statutes* of the realme, or, then their duetie to the *Christian* Magistrate, and to their countrey, *quæ*[1] *omnes omnium in se charitates complectitur.*

[1] Cicero offic. li. 1.

As for the *discouering of a secret, of concealing a matter, & false brotherhood* there spoken of; who doeth not see, that it is meant of needlesse, slanderous, malicious, and *treacherous* bewrayings of our friends, or of others secrets; and not of any *iudiciall* deposing of our knowledges, when we are brought before a *Magistrate*? For if this were not lawfull and godly, then might no *witnesse* testifie a trueth in any matter whatsoeuer, that is not knowen abroad afore, or vnto the *Magistrate*: for that it can not but turne to the declaring of some matter, doubted of or not perfitely knowen. The *comon translation* fortifieth this interpretation, *viz. qui ambulat fraudulenter, reuelat arcana, qui autem fidelis est, celat amici commissum.* Therefore *Aquinas*[2] expounding the true meaning of that place of the *Prouerbs*, saith: that *such matters as tend to the corrupting either of the soules or bodies of a number*; *or to the great detriment of any one priuate person, a man that knoweth them, is* (*in conscience*) *bound straightway to reueale them.*

[2] Tho. Aquinas. 2. 2.

Thus farre in answere of their reasons, who (of such as professe the Gospel) gaue the first example of disobedience in our dayes, by refusall to take oath, in this respect; viz. for that they were vrged to testifie of their fellowes, aswell as of their *owne actions*, whereof they were interrogated.

But an example of *William Thorpe*, who is said by ỹ *Treatisor* to haue

haue refuſed an *oath*, about 160. yeres ſince, vpon this conſideration amõgs others: doth moſt aptly (I thinke) take his place here.

For when[1] *Archbiſhop Arundell* (before whom he was conuented, vnder pretenſe of *Lollardie*) offered him fauour, if, amongs other matters he would be ſworne to forſake his opinions, to withſtand all ſuch as ſhould holde the ſame opinions, & (in caſe they ſhould not be reformed) to put them vp in euery Dioceſſe, where he came vnto the Biſhops: he refuſed this fauour vpon any ſuch condition: becauſe, *he would not* (as he ſayd) *become euery Biſhops eſpie, and Summoner of all England*: nor giue ſuch offence, as to be accounted *to haue forſaken the trueth*.

[1] Fox. fol. 146. 147. 148. 1. editi.

In anſwer whereof, I ſay, that this was but a fauor voluntarily offred vnto him vpon that condition; and that oath was none otherwiſe *exacted* of him, nor yet by lawe might be *exacted*. Inſomuch, as no man is (by law) bound to make any ſuch promiſe, or to enter into ſuch a courſe. Againe, there was no ſpeciall opinion in particularitie charged vpon him, which he ſhould be ſworne to forſake, & ſhould detect others of; except he ſhould be bound to forſake all that he had learned in Scripture concerning the feare & ſeruice of God. and therefore it is nothing like vnto the caſe, againſt which, wee doe here argue. For thoſe *Innouators*, which were authours of this opinion, had particular articles concerning their owne, and others *actions*, *treaties* and *concluſions* obiected vnto them: which were alſo afore-hand conueniently (though not in euery neceſſarie particular) knowen, and diſcouered afore vnto the *Magiſtrates*. vnto which (albeit after many tergiuerſations, and much a doe) they anſwered at laſt in the *Starre-chamber* vpon their oathes that which touched their owne facts only: yet vnto no more thereof would they anſwer, then they preſuppoſed & gathered to be afore knowen, ſufficient for their conuiction, though they ſhould haue concealed it. But what other company they had, thē thoſe who were defendants at that time, or in whoſe houſes ſuch *Synodes*, and *treaties* were held; they pretended themſelues bound in conſcience, not to anſwere. And yet the *Iudges* of the land, twiſe, or thriſe ouerruled it, and ſignified ſo much vnder their hands; that (by lawe) they ought, and were bound, to anſwere the *Interrogatories* preferred concerning ech of their complices and partakers.

It

It may be, that the *Note-gatherer* alſo by one of his quotatiõs, meant to enforce [1] *Tindalls* authoritie againſt vs, in this behalfe. For he writeth, that *if a wicked Iudge aske him that hath ſworne, of things hurtfull to his neighbour, and againſt the loue that is in Chriſt: then he muſt repent that he hath ſworne, but not ſinne againe to fulfill his oath.* I make no doubt, nor do gainesay it, but if mine anſwer ſhalbe, both againſt the *loue* that is in *Chriſt*, & alſo to my *neighbor hurtfull*: that an oath cannot tie me, to anſwer in ſuch a caſe; yet if *Tindall* thought, ỳ whatſoeuer may bring puniſhmẽt vpon my neighbor is of that nature: then muſt he giue me leaue to doubt of the ſoundnes of his iudgement herein; no leſſe then, the *Note-gatherer* himſelfe will do vpon the pointes afore touched; and many other conteined in *Tindalles* workes; and no leſſe then hee will doe vpon the *Rhemiſh* note agreeing wholly with *Tindall* here, and touched by me afore.

[1] Tindal. in reſponſ. ad Morum pag. 309.

He ſeeketh alſo to ouerthrowe (howbeit but generall oathes, which none defends) by cõparing them to the doings of *Longland* ſometimes Biſhop of *Lincolne*, againſt whom he moſt bitterly inueieth, for conſtraining children (by oath) to accuſe their parents &c. of hereſie: whereof ſome (he ſaieth) choſe rather to bee forſworne: and bringeth Maſter *Foxe* his condemnation thereof. But I geſſe what it is which chiefly pincheth the man in this ſort: belike, becauſe certaine of his Clients whome hee would patronize; were lately required to diſcouer their complices in their *diſciplinarie aſſemblies.*

I can eaſily yeelde, that where great preſumption or perill of periurie is, rather then a man wil diſcouer a trueth, that there, and vnto ſuch, it is no good diſcretion to miniſter an oath. but eſpecially againſt the life of thoſe, who attaine ſo neere vnto vs in proximitie of blood, or other no leſſe ſtrong affection. For the *ciuil* law ſaith, *Filius nõ torquetur in caput patris*; a child ought not to be tortured in a point of perill, vnto his fathers life. And the like reaſon, which is in torture, may (by ſome perhaps) be thoght to be alſo in an oth. againſt his fathers life. But we may not make this a general doctrine; as if in no caſe whatſoeuer a childe, or ſuch like might be examined in a point *capitall* to his father &c. For if the matter do concerne treaſon againſt the *Prince*, or the common wealth; I make no doubt, but that, a man may, & ought

to be tortured, euen against his *natural father*, and others, howe neere soeuer. But if this be lawful for *treason* against man, much more then, for that which is *heresie* indeede; being no lesse then *treason* against the *diuine maiestie* of God himselfe, who is King of kings, and Lord of all lords. Thus farre touching their reasons, and allegations from *diuinitie* and *diuines*.

So that al their obiections being refuted, I will nowe presse them in this point, but with one pregnāt place out of [1]*Leuiticus*; which is also handled more fully by me in the 11. chapter of this third part, viz. *If any haue sinned, that is, if he haue heard the voice of an oth, and he can be a witnes whether he hath seene, or knowen of it: if he do not vtter it, he shal beare his iniquity.* But these (of whom we speake) haue *heard the voice*, and forme of *the oath*, *haue bene adiured* in God, and in her Maiesties name; and by authoritie *charged* and *recharged*, *and they can beare witnesse*, *for they haue seene*, *and know the matters* (whereof the charge is, as themselues do confesse) and yet they will not vtter them in particular, but obstinatly, without any good ground (as may appeare) do persist in refusall: and therfore they do grosly *sin*, and *shall beare their owne iniquity*, indistinctly; whether the matters to be vttered be *cōmendable* in their brethrē, or not; & whether they shal (thereby) be brought into trouble, & vnto punishment, or otherwise.

[1] Leuit. 5. vers. 1.

Much might be alledged out of the *common lawe*, and *statutes* to proue thereby, the lawfull exacting of a *necessary oath*, for discouery of our *christian* neighbors *crimes* and *offences*; aswel such of them, as be but *mala quia prohibita*; as those which in their owne nature be euill, and be therefore forbidden.

As that *grand Iuries* at *Assises*, & *Sessions* are vrged by oath to *enquire*, & present *treasons*, *murders*, & other *felonies*, *breach of the peace*, violation of sundry *lawes* & *statutes*, *common Nusances &c.*

[2] 10. H. 6. 7. That if a [2] *tythingman*, *&c. refuse to make presentment*, *the steward of the Leete may amerce him: And in an action of debt brought he shall not wage his lawe*, *vpon that amercement.*

[3] 19. H. 7. ca. 14. That by a [3] *Statute*, *chiefe constables*, *and bailifes were to giue euidence vpon their oathes*, *touching vnlawfull retainers within the precinct of their offices: and vpon concealement*, *were to be punished.* with such like a great number.

But because the *Innouators*, who are nowe the most especiall defenders

defenders of this opinió, both by argument & practiſe, do make no accoũt at al of any *humane lawes*; whenſoeuer they liſt to fanſie vnto themſelues a cõdemnation & contrariety of ſuch lawes vnto the word of God, as in this caſe they doe: therefore I will no further trouble my ſelfe, or the Reader, in that courſe.

CHAP. XV.

Their arguments are anſwered, that condemne the miniſtring & taking of an oath as vnlawful, becauſe they haue not diſtinct knowledge giuen vnto them of euery particular before the taking of it, & the like courſe (by examples) is approoued lawfull, and godly.

ANother *challẽge* of theirs, made vnto the maner of proceeding againſt crimes in *Eccleſiaſticall* courts (& *cõcurring with the very tẽder of the oth*) is: for that *they are vrged to take the oth to anſwer truly, before ſight and peruſall of the articles & Interrogatories by thẽ had; whereby they might haue ſpecial, and diſtinct knowledge, of euery particular, therein conteined.*

The cauſe why this exception is by them taken, is not for that al ſuch refuſers do purpoſe to take the oth, when they ſhall haue ſeene the articles; but if they ſhall finde them to be ſuch as they thinke either cannot be proued (in caſe they ſhal deny them) or to be of that ſort, as they can eaſily wade through with thẽ: then ſome of thẽ (heretofore) haue not ſtuck, nor made any bones to take their oths, whatſoeuer they wil do now. And therfore certaine of thẽ will not ſo much, as promiſe by their word to take *oth*, to anſwer thẽ after peruſal. So that it may appeare, this is but a quarrell picked by them, (of purpoſe to aduertiſe their *complices* how far they alſo may be touched) rather then that there is any ſerious matter of ſcruple herein, which they ſtand vpon.

Some of the cauſes why it is not thought cõuenient (by thoſe that be in *authoritie*) to let them always know the ſeueral particularities aforehand; & ſo to leaue it in their liberty either to refuſe, or to take oath afterward to anſwere them; are ſufficient, and weighty. One is, becauſe it is ſometimes impoſſible in it ſelfe; for that one *Interrogatorie* often riſeth of an other, eſpecially where a man anſwereth affirmatiuely: ſo that the oathe cannot conueniently be in ech caſe reſtrained vnto ſuch of thẽ, as are ſet downe afore; ſeeing neceſſarie occaſion of circũſtance miniſtred,

miniſtred, may leade vnto a further examination. Another is, becauſe (as ſome of them haue done when this fauour hath beene ſhewed) they vſe it but as a meanes, to inſtruct their *confederates* for concealing, or diſguiſing of the trueth: which may appeare, for that after peruſall, they themſelues remaine as obſtinate in refuſall, as they were before.

And albeit no lawe (that I knowe) doth of neceſſitie require articles to be ſhewed to them, at ſuch proceeding, before they reſolue, whether they will take the oathe, or not: yet if any will ſweare (afore) but thus; that he will peruſe them, and after hee hath peruſed them, he wil then take the oath, directly, and truely to anſwere them, ſo far as by law he is bound: aſſuredly then, the ſight of them aforehand neither hath bin, nor will (I thinke) at any time hereafter be denied vnto any, in ſuch a caſe.

Some reaſons I haue heard to haue by thē bin vſed, to proue it vngodly. It is thus written in the [1] *Prouerbs*; *He that anſwereth a matter before he heare it, it is folly, and ſhame to him.* Much more then (ſay they) is it *folly*, to *ſweare* to anſwere a matter, before a man heare it. In very deed, it is not poſſible directly to *anſwere* any matter, before a man *heare* it, and know what it is. But the meaning of the *holy Ghoſt* there, is to taxe ſuch; as vpon a pretence, or for oſtentation of pregnancie of wit, and quicknes of conceipt, or vpon ſome other raſhnes; will take vpon them to vnderſtand a matter and to anſwer to it, before halfe the tale, and materiall points of it, be opened vnto them. Whereupon groſſely (oftimes) miſtaking the whole *matter*; ſuch a man is ſhamed, and *folly* is alſo iuſtly imputed vnto him for it.

Prou. 18. ver. 13

Beſides; this their collection hereof is out of the rule, that is in controuerſie, and practiſe. For there are neuer any ſworn to *anſwer a matter before they heare it.* But (indeed) they take an oath (aforehand) to anſwer the *matter* truely, when they ſhall come to their examination: and then they do *heare* al the matters obiected, before they neede make *anſwere* vnto them.

The grand *Enqueſts* do take alike, yet a lawful oth; which is, that *they ſhal diligently enquire, and truly preſent al offenders againſt any ſuch point, as ſhalbe giuen vnto them in charge*, which charge is giuen, after their oath is taken.

Their next reaſon is, that *for a man to take an oth, without a ſure perſwaſion*

perſwaſion that it tendeth to [1] glorify God, and to further his brethren, is ſinne: becauſe whatſoeuer is not of faith, is ſinne. And that this oath is ſuch, for that a man knoweth not what the matter is, whereof hee taketh his oath. [1] Rom. 14. ver. 23

Herein, the *aſſumption* is to be denied, & *proſyllogiſme* or reaſon, which is brought to prooue it: for it is of, and alſo according to euery honeſt mans *faith*, to beleeue himſelf bound in *conſcience*, to obey the *poſitiue* lawes of his country (which require him to take ſuch othe) ſo they be not contrary *to Gods commandement*.

And albeit euery particular neither is vſed to bee, nor yet is meet, nor (indeed oft times) can be aforehand declared, which is requiſit to be asked of him, as one queſtiō wil grow of another: neuertheles, the *general heads* are ſignified & opened vnto him. and it is withal declared, that he ſhal but anſwere matters of his own *fact*, or *knowledge*: that they touch neither his *life*, *nor limme*, & that (if he think good) he may *challenge* any of thē at the time of his *examinatiō*, as not being bound by law to anſwer them, & he ſhal therein (if law do not bind him) be allowed to refuſe. For the *Iudges* of ech court are appointed to yeeld vnto euery man indifferent *Iuſtice*, according to law. So that the examinate may haue as ſure perſwaſion hereof by this courſe: as if euery particular were read vnto them.

Their third reaſon is: *that this kinde of oathe is infinite, and therfore a ſnare to a mans conſcience, and not like the oath that Abraham* [2] *gaue to his ſeruant.* [2] Gen. 24. à principio vſque ad verſum 9.

Though it be not like in this point, bicauſe that was but a *promiſe* to do one particular matter, whereas in our caſe, the oath, albeit at the taking of it, to anſwer, it be *promiſſorie*; yet the performance of it is *aſſertory*, by telling the trueth of matters, either paſt, or preſent: neuertheles ſuch diſſimilitude doth not hinder, but that this may be no leſſe lawfull, then that *promiſſorie oathe* was, which *Abraham* made *Eleazar* his ſeruant to take.

There is none *infinitenes* in it: for it is not *generall*, either concerning his owne, or *other mens thoughts, words, or workes*, as very vntruly, & ſlanderouſly is (by ſome) giuen forth: but it hath ſufficient certainty, vpō the certain reference vnto *articles* afore exhibited; which alſo are thē declared, to contain particular diducing, & laying forth of ſuch, & ſuch eſpeciall *miſdemeanors*, with

ſome of their *pertinent circũſtances*, of *time, perſon, place*, & *maner*.

[1] Ierem. 4. verſ. 2. Their fourth & laſt obiectiõ is: that a mã ought to ſweare, [1] *the Lord liueth in righteouſnes, in iudgemẽt, & in truth*. This *iudgemẽt*, & diſcretion (they ſay) they cannot vſe in ſuch *ſwearing*, becauſe they knowe not euery particular afore-hand, whereunto they muſt anſwere. And this obiection is alſo propounded and enforced by the *Treatiſour*. But (if it be well weighed) it is a childiſh *fallacie, of the ignorance of the Elenche*; by want of due diſtinction of times. For by reaſon the matters are many; and the *articles* oftentimes long (beſides ſundry other inconueniences, & infinitie of trouble, which would els growe vnto the *Iudges*) it is therefore meet, that the defendant be examined apart, at ſome leaſurable times, and out of the *court*. In which reſpect, though the oath be giuen openly in *Court*, yet the very *examination* is diſpatched afterward, by the *examiner*: and then it is acknowledged before a *Iudge*, as in diuers Courts *temporall* is vſuall, in like caſes of *Articles* or *Interrogatories*.

The *Iudgemẽt* (ſpoken of there by the *Prophet*) that ought to be vſed; is not to be referred only to the very *action* of the oth, when we take it *corporally*: but it is ſpecially meant of the aduiſed maturity, & cõſideratiõ that we ought to vſe; in ẏ *depoſitions* & ſetting downe of our *anſwers*. ſo that ẏ not knowing of euery particular, when by oth we only *promiſe* to anſwer truly at ẏ time of our *examination*, doth no way impeach or hinder the *iudgement*, which is meete, and required to be vſed, in our anſwering: at what time, we may conſider fully & deliberately, of euery particular point.

That this is a true & no forced ſenſe of the place, may be alſo gathered by the laſt point, required there by the *prophet* vnto an oth, viz. that we *ſweare in truth*. for in the very *action of taking the oath*, that *truth* there meant, cannot be vſed; but muſt be ſhewed by the vpright and faithful anſwering, at the time of the *examination*; yea though the *examinate* know them all ſo well, as that he had them without booke, becauſe, as he that giueth the oth, doth but *charge*; ſo by the receiuing of the oath, a man doth but *promiſe* to anſwere *truly*, afterwards. And a *promiſe* doth neither *affirme* nor *deny* the trueth of a matter: but is to be made a true *vowe and promiſe*, by the due performance of it, according as the promiſe runneth, and it is truely meant.

It

It may be, that one of the *Note-gatherers* quotatiõs out of *Tindall*, was by him ſet downe to enforce alſo this point; namely where he thus writeth: *If*[1] *a Iudge put a man to an oath, that he ſhall anſwer to al, that he ſhalbe demanded of, he ought to refuſe.* Is it any maruel that he which holdeth a little afore, *that no Iudge ought to make a man ſweare againſt his will in any caſe*; ſhoulde alſo inferre thereupon, that ſuch a *generall oath*, as this he ſpeaketh of, which no law or practiſe (ſimply) requireth, neede not be taken? But what is this to the refuſall of oathe, when it is not *generall*, but reſtrained vnto certaine *articles*, and points; the heads whereof are alſo opened afore vnto him, who is to ſweare? or what ſerueth it, to iuſtifie a refuſal; for that the defendant may not firſt peruſe euery *Interrogatorie* particularly, before he will reſolue whether he wil take the oath, or refuſe it?

[1] Tindal in reſp. ad 3. lib. Moti pag. 309.

The *Treatiſor* alſo alledgeth (to this point eſpecially as I gather) a ſaying of *Ioh. Lambert* Martyr in his[2] anſwer vnto the 41. article miniſtred vnto him: The fault which (in this behalfe) he findeth, is; for that *a man is charged by vertue of the contents of the Euangely, to make true relation of all, that they ſhal demand of him: he not knowing, what they will demand, neither whether it be lawfull, for to ſhew them the trueth of their demands or no: for ſuch things there be, that are not lawful to be ſhewed.* This he exemplifieth thus: *as* if (ſaith he) *I were accuſed of fornication, and none could be found in me, if then they ſhould require me to ſweare to bewray any other, that I haue knowen to offend in that vice; I ſuppoſe it were expedient &c. not to follow their will &c.* He alſo further findeth fault with *ſuch Iudges for that ſometimes not knowing by any due proofe, that ſuch as haue to do afore them, are culpable; yet will enforce them by an oth, to detect themſelues, in opening before them their hearts.*

[2] Fox pag. 569. 1. edit.

For anſwer hereũto: Firſt there is none that defendeth any ſuch *generall* exacting of an oth, to anſwer whatſoeuer ſhal be demãded. Beſids, what is here any way ſounding to the condẽnation of miniſtring an oth for anſwering to particular *Interrogatories*, touching certain knowẽ points, opened before vnto ỹ party? Secõndly, the iudgement of *Lãbert*, that a man is not boũd (indiſtinctly) to bewray whõſoeuer hee knoweth to haue offended, is alſo allowable. For a man being ſo generally asked, is not boũd (by any law that I know) to take oth, to bewray whatſoeuer he knowes,

touching al other mens faults; ſo they be meerely ſecret, not manifeſted at al abroad, nor bringing any *ſcandal* or apparant danger, either to the *church* or *common weale*, or vnto the ſoules of a multitude, & whereof he may & ought (in charitie) preſume; that the offendors be repentant. Thirdly, I take this iudgemēt alſo to be very ſound both in *diuinity* and *law*; that a man may not be vrged in any humane court, to diſcloſe what hee thinketh *in his heart:* vnles by word or deed, it be come vnto ſome ouert *Acte*. For if it come ſo far, there may be then ſundrie occaſions, why a man ſhould be examined, what he thinketh or beleeueth. As if a man wil alledge *indicially* ſomething, & deſire it to be admitted which ought ſo to be, in caſe he propound it *bona fide*, & not calumnioufly: the *Iudge* may here vrge him, to declare by his *oth*; whether he beleeueth the ſaid matter to be true, & that he thinketh it may be prooued. Likewiſe, he that ſhall be detected to haue ſpoken like an *Atheiſt*; or an *Heretike* againſt *God*, may be examined vpon his oath touching his beleefe. neither is the bewraying of himſelfe herein, *capitall* vnto him, vnles he ſhall wilfully perſiſt in his error, and blaſphemy. and therefore I thinke, that by the lawes and policie of this realme, it is otherwiſe in a perſon, which hath once *abiured*, & is againe *relapſed*. & that he ought not to be examined by oath, touching his hereſies by him vttered and holden. becauſe if he be conuinced to haue *relapſed*; he ought (by lawe) to be burned, notwithſtanding he ſhall then againe pretend reuocation of his error and hearty repentance.

Out of this anſwere of *Lamberts* vnto that article; I obſerue, that the *Treatiſour* (in my copie at leaſt) hath ſomewhat changed theſe words, viz. *and none could be found in me, if then they ſhould require me, &c.* for inſteede of *if then*, hee hath put theſe, viz. *or if:* becauſe he would not haue them ſound any way, as if *Lambert* meant, that a man might bee ſworne touching the crime of *fornication* imputed to himſelfe; albeit hee were not bound to bewray all others, whome he knewe to haue offended that way. Beſides, by *Lamberts* ſaid anſwer it appeareth, that he thought, *Magiſtrates* might cauſe ſubiects to ſweare (though againſt their wils) & that they are bound to obey them therein: which he exemplifieth by that which *Salomon* might haue done with the two women, which contended about the childe; if otherwiſe

otherwiſe he could not haue found out the trueth thereof. And he concludeth his anſwere to that article thus: viz. that *he thinketh it lawfull at the commandement of a Iudge to take an oath to ſay the trueth: ſpecially if the Iudge require it duely, and in lawfull wiſe.* whereby we ſee *Tyndals* iudgement by *Lambert* to be controlled, where he writeth abſolutely; that *no Iudge ought to make a man ſweare againſt his will.* Laſtly, *Lambert* there concludeth, that *a Iudge may cauſe a man to make an oath in any other caſe conuenient, and that alſo for purgation of infamie, when any infamie is lawfully laide againſt a man.* So that the *Treatiſour* himſelfe, who condemneth all ſuch oathes of clearing, as *purgations poyſonfull*, for that they may *induce periurie*; is by this his owne allegation, (which he may not refuſe) well confuted.

The *Notegatherer* auoucheth alſo three examples, where men were proceeded with, for matter of pretended *hereſie*; and yet had a copy of the Articles deliuered vnto them. But he telleth not, whether they were afore that, or afterwarde ſworne. But howſoeuer ſome were then thought good to be proceeded with; yet cannot this prooue, that it was holden to be vnlawfull, to doe otherwiſe. For I haue alſo knowen the like fauour vſed, vnto ſundry pretending ſcruple in this point: who (in very deed) little deſerued it: for they were neuer the neerer afterward, to make oath to anſwere them.

The equitie of this proceeding, yea farre aboue the lawfull practiſe of *courts* on the other ſide the ſea, in their proceeding againſt crimes (euen *capitall*) by the courſe of the *Ciuil* lawes may appeare; by comparing of them in ſome points together.

They haue there, two Proceſſes in moſt *criminall* matters: the firſt is called *proceſſus informatiuus*, which conteineth al the *Indicia*, or the *Enidẽces*, preſumptions, & ſayings of thoſe, which can teſtifie againſt the partie *enquired* of. Theſe be taken aforehand for the priuate inſtruction of the *Iudge*, euen in the abſence of the *partie*, & ſerue for to ground his *Enquirie*. The other, is ý very *Proceſſe criminall* or *punitiue*, whereunto the partie conuented is to anſwere: and reſembleth much our *Inditements* at the common lawe. *which inditing* in *France*, they call *making a mans Proceſſe*.

Nowe, it is by [1] a general cuſtome obſerued (where the *Ciuil* lawe in that behalfe hath place) that the ſuppoſed delinquent is

[1] Conrad. fol. 255. & Foller. in Pract. crim. fol. 165. nu. 9 & Iodoc. in Pract. fol. 24. nu 18. Maranta in Specul. fol. 8. nu. 8.

interrogated, and *examined*; and the *witnesses* also (after *production* in his presence) are againe vpon their oaths repeated, in the processe *punitiue*: before the *partie* may haue a copy of the *euidences* and presumptions, that were taken against him; vpon the *processe informatiue*. And it is testified; that the *Iudge* should doe euil, if he should otherwise obserue it. For [1] *that which hath receiued interpretation, & approbation of equitie*, by continual practise, & long custome; ought not by any singular person, to be chãged.

[1] Innoc. in c. bonæ. el. 1. nu. 5. de elect. Baldus in l. edita in repetit. Patau. nu 30. C. de edendo. & in l. ea quidem. nu. 42. c. de Accusat. & al j plurimi.

The reason of this course by them holden is weightie: For [2] otherwise by the *publication* and copies of the *Processe Informatiue* giuen vp vnto them: the supposed delinquents (being instructed thereby, what *Euidence* is to be vsed and giuen against them) might, and by likelihood, would (for their owne safegard) practise with the *witnesses*; and either withdrawe them cleane away, or els *suborne*, and *corrupt* them.

[2] Clarus lib. 5. § fin. q. 49.

This *Processe informatiue*; I meane the particular points of the *euidence* and presumptions (yea and sometimes also the *witnesses* names, that can testifie, & may be vsed) in the court of *Commission*, and in *ordinarie* courts *ecclesiasticall*, are inserted into, and conteined in the *Articles* obiected. Nowe assoone as the conuented partie hath answered the *Articles*; in this Realme (of course) he is, if he wil, to haue a copy deliuered; both of them, and of his *answers* made vnto them before any witnesses be called, or vsed: albeit (indeede) great inconuenience of *subornation* (for auoyding punishment) might thereby happen, and be occasioned. So litle cause haue these men to complaine, of any rigorous or strict course vsed towards them: as by the example of the *generall custome* of the world abroad, might be folowed. Neither haue they any cause to complaine hereof, as of a thing *vnusuall*: for not hauing (other then a generall knowledge) of the matters against them, before they doe sweare.

If that [3] *Canon* be obiected; *viz. exponenda sunt ei illa capitula de quibus fuerit inquirendũ, vt facultatem habeat seipsum defendendi*: I answer; that in *ecclesiastical* courts of this realme, this is obserued, euen before the oath is tendered: & after the partie hath answered, he hath a *copy* not only of the *heads* of the matters obiected; but of euery particular also. Howbeit this *Canon* distinguisheth not at what time these are to be opened vnto him: otherwise, then

[3] c. qualiter & quando. el. a. de accusat.

then when hee is to vſe his *defence*: which (commonly) is after the witneſſes be *publiſhed*: when as he chalengeth and excepteth againſt their *ſayings* or perſons.

But if the *Ciuill* law be alſo vrged (to this point) which[1] requireth copies *indiciorum* of the *inducements*, or *euidences* to be giuē to defendants: I anſwer, that it is but before he is *tortured*; that he may haue opportunitie to anſwere, and to auoyde ſuch *preſumptions*, before he ſuſteine ſo irreuocable a dammage: which reaſon hath no place in that matter, which we nowe handle.

[1] L. vnius. §. cognituru. ff. de quæſtionibus. L. 3. §. ſi ad diem ff. de re nulitari.

Beſides, this rule hath many limitations, or excepted caſes: For firſt it[2] is otherwiſe, when the partie *enquired* of, or *accuſed*, was afore that time of euil *fame*. Secondly, when a *copy* of them, is not deſired by the defendant. Thirdly, when hee purpoſeth no defence, but onely would labour to prooue the *Indicia* to be falſe. Fourthly, when the proceeding is by *Enquirie*, accord ng to the fourme of ſome ſtature. Fifthly, where there may be probable feare, that the witneſſes ſhal thereby be hurt, or preiudiced. Sixtly, whē the *crime* is *notorious*. Seuenthly, when the proceeding is of *meere office*. Eightly, when the defendant varieth & faultreth in his anſwers. Laſtly, whē he afore refuſed to anſwer to ẏ *Interrogatories*. By all which we ſee, both ẏ the ſaid rule is to be vnderſtood of deliuering *copies*, after *publication* of witneſſes, & not before the defendāts *firſt examination*: & alſo, ẏ ſuch diſobediēt perſons, as refuſe to anſwer ẏ *Interrogatories* as they ought (though they were not proceeded with *of Office*) yet are by law debarred, from hauing copies of any neceſſitie, otherwiſe then of curteſie.

[2] Campeg. in addit. ad Zanchinū de hæretic. ca. 9.

And if the oath to be taken were ſo *generall* as they pretend, whereas it is (indeed by way of *reference*) very *particular*, & *certaine*: yet they might finde examples for approuing of the equitie of oaths more *general* then this; both in the lawes of the *Realme*, & in the word of *God*: wherof al the particularities neither at the taking of it were, nor could be *iudged* of, afore the *oath* taken.

Firſt, at the *cōmon* law, is not the oath of *Iurors* in the *grand Enqueſt* at al *Seſſions*, & *aſſiſes*; to *enquire*, & *preſent* al within that *ſhire*, that be culpable of breach of any the *lawes* & *ſtatutes* which they ſhall haue in charge (afterward to be giuen:) as large, yea and a more *generall* oath, then to ſweare to anſwer halfe a dozen, or a dozē *articles*, or *interrogatories* remaining afore in court, preferred?

By

[1] Statut de Exon. de Inquisit. super Coronatores.

By ſtatute it is appointed, that [1] *Enquirers againſt Coroners, ſhall make all the Bailifes ſweare, that they ſhal well, and faithfully do that, which they ſhall haue in charge by the king and his Counſell, and ſhall conceale nothing of it.*

[2] 12. Ric. 2. ca. 7.

Iuſtices of Peace (by an old [2] ſtatute of *Richard* the ſecond) are *to be ſworne, duely, and without fauour, to keepe, and put in execution, all the ſtatutes and ordinances, touching their Office.*

The like oath, and ſomewhat more *generall* is appointed vnto

[3] 37. H. 8. ca. 5.

them by a later [3] ſtatute, to be taken; viz. that *they ſhall keepe all ſtatutes made, and to be made.*

The oath eſtabliſhed to be taken by great *Officers* of *the State* and of *Iuſtice* (vpon another occaſion afore alleaged) is alſo of

[4] 15. Ed. 3. ca. 3.

greater *generalitie*. For it is [4] enacted, that *great Officers about the king, and in his courts of Iuſtice, ſhall from time to time forwarde be ſworne (when they ſhalbe put in office) to keepe, and mainteine the priuiledges, and franchiſes of holy Church, and the points of the great Charter, and the Charter of the Foreſt, and all other ſtatutes, without breaking any point.*

The oath appointed by the nowe repealed ſtatute againſt *hereſie* was *very generall:* and yet that point, thought agreeable ynough, to equitie. for this was not any ground of the repealing

[5] 2. H. ca. 7.

of it. By it was determined that the [5] *Chancelor, Treaſourer, Iuſtices of the one Bench, and of the other, Iuſtices of Peace, Maiors, and Bailifes of cities & townes, & al other Officers hauing gouernance of people, ſhould make an oath; to put their whole power, and diligence to deſtroy all maner of hereſies, and errors, &c. and to aſſiſt the Ordinaries, and their Commiſſaries: and them fauour and mainteine, when they ſhalbe required.*

The circumſtance of time (in that the oath is tendered before the defendant hath particularly peruſed the *Articles*, or *Interrogatories*) is ſufficiently iuſtified by the like general practiſe in the *Starre-chamber*, and *Chancerie*; and in *examinations criminall* made by other *Iudges* and *Magiſtrates*. In all which, the oath (as I am credibly informed) is taken, before the examinates haue any copy, or may peruſe the *Interrogatories*, where written *Interrogatories* be vſed: and where they are not written, there is no poſſibilitie of knowing all (particularly) that ſhalbe demaunded; inſomuch as one queſtion (neceſſarily) riſeth vpon the anſweres,

that

that ſhall bee made to the former.

I reade a report of the *Canon* lawe, where *in an* [1] *action of debt brought againſt the husband, and his wife for the wines debt before the couerture; the woman without the husband could not be ſuffered to wage her lawe.* And is not this oath of the husbands part (though lawfull) as farre from that *aſſured perſwaſion* of the very trueth thereof: and is there not as great want of the husbands certaine *iudgement* herein, as when an oath is taken to anſwere articles (in themſelues *finite*, and *certaine*) though particularly not peruſed by him afore? For nothing to the contrary can be heere (I thinke) alledged; ſauing that it may bee, the husband himſelfe had, afore the *wager of lawe*, payde the ſaid *debt of his wife.* [1] 15.E.4.2.

There is a [2] ſtatute (ſaith the *Notegatherer*) which requireth a copie of the *Libell* (put vp in a court *Eccleſiaſticall*) to be deliuered to the defendant: and thereupon is there a writte framed, and put in the *Regiſter*, *pro copia libelli deliberanda.* It is very true which by him is alledged. the reaſon was, for that the defendants coulde not then procure *prohibitions* from *temporall courtes* without their viewe of the *Libell:* which (in that reſpect) was ſometime by Iudges *Eccleſiaſticall* denied; and the lawe (as it ſeemeth) was at that time ſo taken. but if the lawe were not onely ſo taken, but ſo practiſed ſtill; for my part, I ſhould hold it more agreeable to reaſon, and that it would preuent many long delayes, and other great inconueniences. Neuertheleſſe, when one thing ſeemeth (cautelouſly) to bee in demaund by the *Libell*, and another thing (in trueth) not incident to an *Eccleſiaſticall* court, is vnder hand ſhot at: then, and in ſuch caſe only, vpon apparant probabilities thereof ſhewed vnto the temporall *Iudges*; it cannot be thought inconuenient for them to graunt a *Prohibition*, yea though the *Libell* be not viewed afore by them, nor cõteine expreſly any matter, belonging to a temporal court. [2] 2.H.5.ca.9.

But ſeeing the ſtatute ſpeaketh but of a *Libell*; it cannot be extended to all *articles* or *Interrogatories* whatſoeuer, miniſtred in a *Crimtnall* cauſe: eſpecially, where there is no likelyhood, or colour, but that the cauſe is meerely *Eccleſiaſticall:* or where it is handled by vertue of *Commiſſion* vnder the great Seale of *England* grounded vpon the ſtatute. For if her *Maieſties Supreme*

Royall auctoritie and power Eccleſiaſticall granted by cõmiſſion to others, be as highly veſted in her crowne as is her *Temporall*: then will it bee probably gathered, both of them being in their ſeuerall kindes ſupreme, and the exerciſe of them cõmitted ouer to others, vnder the great ſeale; that the one of them is not to be abridged, reſtrained, or controlled by the other.

[1] Gen.21.V.23. In [1] *Scripture*, by the oath that *Abimelech* miniſtred to *Abraham*, and which he tooke, appeareth; that thereby *Abraham, was to deale well with him*, (or as the *Hebrew* word is, *not to deale falſly or lye*) *vnto him, nor vnto his children*: and that *he ſhould deale well both with him, and the whole Country, according to the mercie and kindneſſe (there) ſhewed vnto him.* which poynts be of greater largeneſſe, and *generalitie*; then that all the particulars (falling vnder that oath) can poſſibly be fore-thought or called to mind, at the very taking of it.

[2] Gen.25.V.33. By *Iacobs* [2] requiring an oath of *Eſau*, for confirmation of *the ſale of his birthright* (a thing of greater *generalitie*, yea & conſequence alſo, then *Eſau* could, or did then conſider) may be gathered; that an oath may be miniſtred, though euery particular included therein, be not *ſpecially* rehearſed: for this oath was approued, and ſtood *ratified*.

The like *generall* league, and couenant, that was betwixt

[3] Gen.26.v.29. & 31. *Abimelech* and *Abraham*; was alſo [3] made, & ſworne, betwixt *Iſaac*, and the ſaid *Abimelech*.

And albeit, it be not directly ſet downe, that the king exacted

[4] Ierem.38. ver.14.& 15. *an oath* of the Prophet *Ieremy*; yet we [4] find a promiſe of the ſaid *Prophets* then made (after the *kings* charge was laid vpon him) of anſwering truely, what he ſhould aske him: yea without expreſſing any particular matters afore-hand, what [5] king would aske. Yet may we not therefore charge the *Prophet* to haue done this without *faith*, or *fooliſhly*; vnaduiſedly, or without *Iudgement*.

And it is ſure, that a godly man ought to haue no leſſe regard to performe what he promiſeth, & to deale truely (when by his *Soueraigne Prince* he is in like ſort charged) then if hee were to anſwere it, vpon his *Corporal oath*. So that we may conclude, that it is not *vnlawful*, or *vngodly*, to take an oath: that we wil performe ſome ſuch matter, whereof euery particular is not afore-hand, or at the very time remembred vnto vs; or then can bee called to minde or knowne by vs, in *diſtinct* and *ſpeciall* maner.

CHAP.

CHAP. XVI.

That after the partie hath anſwered vpon his oath, it is neither vnuſuall, vnlawfull, nor vngodly; to ſeeke to conuince him, by witneſſes, or other triall; if he be ſuppoſed, not to haue deliuered a plaine & full trueth: and ſomewhat alſo in approbation of Canonicall purgations, *with anſwere to the* Treatiſours *obiections againſt them.*

THeir next exception (ſet out afore in this order to be ſpoken of,) which this ſorte of men doe make vnto the maner of proceeding Eccleſiaſticall, (being of a thing enſuing after the oath and examination) is; for *that Iudges Eccleſiaſticall doe not alwayes reſt in that which is affirmed or denied, vpon the parties oath: but doe oft times proceede to a further enquirie, by examination of witneſſes, vpon the poynts denied by the partie.*

A man might iuſtly maruell, what ſhould mooue them thus to require all other men to thinke ſo well of their ſingle oathes, (and eſpecially in their owne cauſe) as if they had ſome indignitie offered vnto them, onely becauſe their owne ſingle oathes are not perfitly beleeued; but that proofes (by witneſſes) are after made to conuince them, of that, which is denied by them.

But for this they bring alſo ſome pretence (as for the reſt of their opinions) out of the *Scriptures.* It is ſaid in the Epiſtle to [1] the *Hebrewes*: that *an oath for confirmation, is amongſt men, an ende of all ſtrife.* Whereupon they gather, that whatſoeuer they ſhall deliuer vpon their oathes, it ought to be finall & peremptorie, to conclude the cauſe of neceſſitie, without any more adoe. [1] Heb. 6. v. 16.

The vſe of the oath, which is in that place ſpoken of, is (eſpecially and moſt properly) appliable, to two kindes of *oathes.* The firſt is an *oath Promiſſorie*, when (for more aſſurance of the promiſe to bee kept) the parties agree, that it ſhall bee taken. which thing is argued by the circumſtance of the place, as being brought to prooue the certaintie of the *Promiſſorie oath*, which God made vnto *Abraham*: and alſo by the word of *Confirmation* there vſed. Secondly, this place hath vſe very properly alſo, in an *oath Deciſorie*: when [2] as either the one or the other of the parties is contented, to put the matter that is in variance, vpon his aduerſaries owne oath: [2] Azo. in Summa de rebus creditis.

which if he thereupon ſhall take, it maketh an end of the whole ſuite *and ſtrife*. For in this caſe, he that ſo offered it, ſhall not bee permitted to vſe any contrarie proofes afterwards: becauſe hee made choiſe to haue the whole cauſe in variance betwixt them, compoſed in that ſorte.

It may alſo truely be anſwered to that place, that an oath indefinitely taken; is (in deede) a meanes prouided, and tending to make ende of all ſtrifes amongſt men: but not that in euery cauſe and matter whatſoeuer, one mans ſingle oath ſhould therfore be ſufficient. becauſe many abſurdities would follow of ſuch an interpretation. as namely, that a mans oath in his owne cauſe, ſhould be as good and forcible; as any other two mens oathes touching the ſame matter. But the law ſaith: *dictum vnius, dictum nullius.* One *ſingular depoſition*, though of a witneſſe (who is not intereſſed in the cauſe, and therefore the more indifferent) is not to be taken for a full proofe. Then howe much leſſe ſhould the parties oath (whom the lawe preſumes to be partiall in his owne cauſe) be admitted for a concludent proofe, eſpecially to his owne *clearing* or benefite?

Beſides, if ſuch their interpretation of that place ſhould be followed; then were this place cõtrary, to ſundry other places in the Scripture; which *is blaſphemie* to imagine. For [1] *one witneſſe ſhall not teſtifie againſt a perſon to cauſe him to die, but witneſſes*, therfore moe then one. And by conſequence, a mans owne witneſſe (in his owne behalfe) is not ſufficient. *At the* [2] *mouth of two or three witneſſes, ſhall he that is worthy of death, die: but at the mouth of one witneſſe, he ſhall not die.* Againe: [3] *One witneſſe ſhall not riſe againſt a man for any treſpaſſe, or for any ſinne, or for any fault that he offendeth in: but at the mouth of two witneſſes, or at the mouth of three witneſſes ſhal euery word be eſtabliſhed.* [4] Like-wiſe in the *Goſpell: by the mouth of two or three witneſſes, euery word may be confirmed.* Furthermore, *it is* [5] *written* (ſaith Chriſt) *in your law, that the teſtimonie of two men is true.* [6] Moreouer, *S. Paul* ſaith: *in the mouth of two or three witneſſes, ſhall euery word ſtand.* And [7] againe: *he that deſpiſeth Moyſes law, dieth without mercy, vnder two or three witneſſes.* And to [8] *Timothie* in like maner: *receiue none accuſation againſt an Elder or Miniſter, but vnder two or three witneſſes.* Much leſſe then (of any neceſſitie) ſhall a mans owne teſtimonie of himſelfe,

[1] Num.35.v.30.
[2] Deut.17.v.6.
[3] Deut.19.v.15.
[4] Matt.18.v.16.
[5] Iohn 8.v.17.
[6] 2.Cor.13.v.1.
[7] Heb.10.v.28.
[8] 1.Tim.5.v.19.

himſelfe, and for his owne benefite or clearing, be receiued for an vndoubted trueth. The blinde *Phariſees* could ſee ſo much; that it was abſurd, for any ſinfull man to arrogate ſo much to himſelfe, that his owne witneſſe touching himſelfe, ſhould ſuffice. Therefore they ſay [1] to *Chriſt*, whom they tooke to be but man onely; *thou beareſt record of thy ſelfe, thy record is not true.* And *Chriſt* himſelfe ſignifieth the like, for he ſaith: [2] *If I ſhoulde beare witneſſe of my ſelfe, my witneſſe were not true.* meaning, that where there is no further *teſtimonie* for a man, then his owne: there is no ſufficient cauſe, that other men ſhoulde holde his ſpeech for true, or reſt in it, as certeine.

[1] Ioan. 8. v. 13.

[2] Ioan. 5. v. 31.

And therefore we ſee; that albeit the woman, whom her huſband hath in *Ielouſie*, is put [3] vnto a moſt ſtrict oath (with an *imprecation* and *curſe*) that *ſhe is not defiled:* yet is there (by the law of God) appointed a further triall, and *ſhe is alſo to drinke the curſed water.* which (by Gods ſecret operation giuing might vnto it) was of force, both to reueale, and to puniſh her periurie (if ſhe were forſworne) by making her (moſt lothſomely) to rotte aboue the ground, being yet aliue.

[3] Num. 5. v. 22. vſque ad 28.

Of further *inquirie* and the equitie of it, after the oath taken, and deniall or qualifying of the matter by the partie: we haue alſo ſundry examples in the [4] *Ciuill* law of the *Romanes.*

[4] l. 13. C. de rebus creditis & iureiur.

If an oath be taken by any man touching a legacie left vnto him by a Teſtament, or of the truth of any other inſtrument; this oath is not ſo to be reſted in: but that all may be againe reuoked vpon proofs, made againſt that oathe; leaſt the lawes ſhoulde ſeeme to permit a man to reape beneſite by his owne wicked periurie.

So [5] *if the Iudge (and not the partie) doe tender and defer an oath to the other partie, if by ſome publike inſtrument,* (viz. matter of record) *or any like ſufficient matter, proofe may afterwards be made, of the falſhood of ſuch oath: it ſhall be reuoked, and all that dependeth vpon it.* The reaſon hereof [6] is aſſigned, for that *the parties owne othe is but a kinde of doubtfull proofe.*

[5] l. admonendi. 31. ſi. de iureiur.

[6] Duarenus 2. diſp. anniuerſ. cap. 33.

Furthermore, [7] *if either of the parties ſuing, doe take oath that he hath neither giuen, nor promiſed any thing to the Iudge; yet if within ten moneths (after the ſentence giuen) it ſhall be proued, that herein he hath ſworne falſly: both the giuer and the taker, ſhal haue all their goods and lands confiſcated, and ſhall be baniſhed.* So is that [8] law alſo,

[7] Auth. quod iure. C. de pœna iud. qui malè iudicauit. Nouell. conſt. 124.

[8] Iaſon in l. ſcimus. §. licentia. C. de iure delib. randi. num. 1.

alſo, after an oath is taken of the trueth of an *Inuentarie*: and (in reſpect of the proofe) is dayly practiſed. For any of the *Creditors* or *Legataries*, may take vpon them to proue, that ſomething is left out of the *Inuentarie*. Which if they doe, the *heire* or *executor* ſhall forfeite double as much by that lawe, where (in this behalfe) it hath his place, and vſe.

Yet that which in the two former examples is ſaide of puniſhing; is [1] ſpecial vnto thoſe two caſes, & to ſuch like; as the law doeth (ſpecially) ſo determine of. For (ordinarily) the rule is, that if it happen, (and ſo fall out vpon proofes afterward) that the defendant hath depoſed falſly in his perſonall anſweres (the cauſe being mooued by way of *litigious iuriſdiction*) thereupon he is not to be puniſhed as a perſon [2] periured; but is left vnto the vengeance of God, to fall vpon him for it. And ſo is it vſually practiſed in Courtes of that nature.

[1] Alex. in Apoſtil. ad Bartol. in l. 1. nu. 1. ff. de bonis eorum, &c.

[2] Boſſius. tit. de Periuris, nu. 3.

According vnto which lawes of enquiring by witneſſes, after the defendants oathe taken; we alſo [3] finde the *cuſtomes* and *ordinances* of the great Court of the *Imperiall Chamber* in *Germany*, to be. *For if a man cleare himſelfe (there) by his oath, of any crime imputed vnto him; yet may any man take vpon him to* accuſe, *and to proue it afterwards againſt him. In which caſe* (by thoſe Ordõnances) *if the partie defendant happen to be conuicted, then ſhall he bee puniſhed, not only for the principal crime; but for his periurie alſo that he hath committed, in denying it.* This their municipall lawe, is agreeable to the *Ciuil* and *Canon lawes*, there practiſed. For (as hath bin touched afore, by other occaſion) a purgation ſhall not ſo finally cleare a man; but that if good proofes may bee (after) made of the truth of the very crime it ſelfe, he ſhall be puniſhed; both for that facte, & for periurie alſo: & therefore an oath of the partie, yea, though his cõpurgatours do loyne with him (vpõ their credulities) is not final, nor can debarre further procedings.

[3] Ord. Cam. Imper. tit. de Purgatione. §. vnd ſo er follich.

I had occaſion afore, to alledge out of the [4] *Ordonnances* or ſtatutes of *France* (touching a *corporal oath* to be taken) concerning the number, weight, meaſure, and place (intended) for vnlading of marchandiſes, to be ſhipped out thence: & that there was no deceitefull or forbidden wares amongſt them. Yet (this oathe notwithſtanding) it is there further prouided, that *if vpon inquiſition to be made, any thing ſhal be found contrary to the declaration made by the partie vpon his oathe; he ſhall loſe his marchandiſe, he is grieuouſly*

[4] Tom. 2. liure 2. des Ordonnances per Henry 2. pag. 1195.

grieuously to be fined, and besides shall be punished as a forger, called Falsarius, in the Ciuill lawes.

By the lawes of this *Realme*, such further triall is vsually practised; and proofes are very often made to the contrarie of that, which the defendant hath deliuered in, vpon his oathe. In the Court of *Chancerie*, if *plaintifes* should alwayes rest, and might proceede to no further proofes, after the *defendant* hath answered vpon his oathe: they shoulde (for the most parte) haue very colde suites, and small relefe or remedie could bee giuen, by that *high Court*. The like is to be thought of the Courtes before the *Queenes Counsels* established in *Wales*, and in the *North* parts, and of the *Court of Requests*.

In that most honourable Court of the *Starre Chamber*, the defendants doe not onely answere the Bils preferred (by vertue of their oathes,) but also vnto sundry *Interrogatories*, seruing to the like purpose. And yet after all this, it is thought necessarie to vse further proofes also by *witnesses*; and not to bee conuenient, to rest onely vpon the *honestie* and *conscience*, of the supposed delinquent.

Besides this practise and long continued custome (*quæ est optimus legum Interpres*) there be also statutes in the very point.

By the statute of [1] *Bankrupts* in K. *Henry* the 8. time, authoritie is giuē to certaine there named, *to call and examine such as are suspected to conceale such offenders goods; and to examine them by their oathes, and by other wayes (as in discretion they shall thinke meete) vpon the specialtie, certeintie, true declaration, & knowledge of such offenders goods or debts owing to him: and if he shewe not the whole trueth* (to bee after prooued by witnesses, &c.) *then hee forfeiteth double the goods concealed.* [2] And the very like clause in that matter of *Bankrupts*, is established by a statute, made in her *Maiesties* time.

[1] 34. H. 8. ca. 4.

[2] 13. Eliz. cap. 7.

At the *Common* lawe, the *Iudges* doe not alwayes rest in an oath of a *partie*; but doe sometimes *enquire* further of the trueth of it; and doe punish him also for taking a false oath, if he be thereof conuicted. [3] *One was brought into the Court as a pledge, and did sweare he might dispend fortie shillings land by yeere: yet the Court rested not in this oath, but examined the matter more straitly; vpon occasion that one then present, & dwelling in the same place, did*

[3] P. 5. H. 6. fol. 35.

did affirme that the other might dispend nothing, and it being founde, that he could dispend but twentie shillings by yeere, he was committed to the Fleete, till he had paid his fine. So that (both by diuine and humane lawes) we see neither reason, equitie, nor practise; for *Iudges* (necessarily) to rest in a mans *answere made vpon his oath*; without proceeding to the taking of any further proofes. whereby, the lawfulnesse of that oath (which I termed partly of *Purgation* and partly of *Enquirie*) is more particularly also approued.

But the *Treatisour* condemneth all *Canonicall purgations*, as contrarie vnto equitie: and therefore termeth them *deadly purgations, not healthfull but hurtfull, and poysoning purgations, dangerously giuen for preseruatiues.* Which if it were true, would take away not onely our reason taken from proofes which may bee made, euen after the parties *Canonical purgation*; but also the *oath* which I termed partly of *purgation*, and partly of *Enquirie*.

What his reasons to that purpose be, it will not therefore bee amisse, briefly to cõsider: & to adde also some-what, for clearing of lawes and courtes *Ecclesiasticall* from vniustice herein; and for the defence of the vse of *purgations*, by the parties owne othe, &c.

The conclusion which (in this behalfe) he taketh vpon him to proue: is, that *proceeding ex officio, to forced purgations is hard, and vniust dealing towards men; and a great abuse of the name and maiestie of Almightie God, cloked and shadowed neuertheless, vnder glorious and painted glosses, &c.*

But he mistaketh the matter greatly, to thinke that those matters which (in the aforesaid *doctors* schedule) he challengeth for no better then *painted glosses, beautifull shewes*, and *fained pretenses*, were by them set downe, for iustifying *of purgations*: for they were (in deed) principally by them mentioned, to shewe the necessitie of *Enquiring* by *oath*, and of *punishing* offenders. If I thought, that in his setting forth of the state of this question, he fixed any force in that point for that the proceeding is *ex officio*: I woulde then remitte the Reader vnto that, which hath bene spoken thereof, in the second parte.

For proofe of *Iniustice* thereby *offered vnto men*; hee presseth those *Doctors* with their owne *maxime, viz., Nemo tenetur* * *seipsum prodere*. But why hee that is otherwise very *presumptiuely* detected; should not be driuen to shewe, and declare his *innocencie*

* Vide cap. 9. 3. part.

cencie vpon his oath, or elſe yeelde to the *detect* (which they alſo adde for the true vnderſtanding thereof) he ſheweth no reaſon: other then that, as *a gloſſe confounding the text*, *It wholly* (he ſaith) *deſtroyeth that rule and principle.* But how can it bee verified, that this *principle* is thereby wholy deſtroyed: when as the detection made by *fame*, by *denunciatiõ*, or *preſentment*, *&c.* commeth from others, and is not a mans owne detection of himſelfe? therefore it is not ſo much as a *limitation* properly: but rather a true expoſition, how that rule ought to be vnderſtood. By as good reaſon it might be ſaid; that becauſe a man, is not at firſt, by any courſe of Iuſtice, bound to diſcouer the very facte againſt himſelfe; that therefore, being called into queſtion, and touched by great preſumptions, and arraigned for it; there is no Iuſtice to vrge him, to pleade either not guiltie, and ſo to lye; or elſe guiltie, and ſo to bewraye himſelfe.

For proofe of *an abuſe* of *Gods name and Maieſtie by purgations: he ſayeth, to offer an oathe vnto perſons diffamed, concerning their owne corrupt life; argueth a lightnes, and want of good diſcretiõ in the Magiſtrate, For that he wittingly doeth miniſter an occaſion of periurie.* I haue ſpoken of this point (by occaſion) afore: and I truſt the Readers wil pardon my neceſſary repetitiõs (ſometime) of one matter in diuers places: conſidering the *Treatiſour* vpon one reaſon, ſeeketh very often to build many ſeuerall, & diſtinct concluſions.

Firſt no man ought by any occaſion whatſoeuer, be drawen to goe againſt his oath, or to periure himſelfe; a word (moſt properly) verified in an oathe *Aſſertorie*, ſuch as that of *purgation* is. Secondly, it is to bee denied, that whatſoeuer a man of a bad minde, may take for an *occaſion* to forſweare himſelfe; that in euery ſuch caſe, it is *lightnes*, and *vndiſcretion in the Magiſtrate to offer an oathe.* Which may appeare, by *deciſorie* oathes, or *wagers of lawe* in actions reall, or perſonall for landes and goods: being ſuch things, which be as deepely (by moſt men) tendered, and affected; as their owne good names, or honeſt *reputations.* Thirdly, it is too grieuous a charge, to bring euery *lightnes or vndiſcretion of a Magiſtrate*, within the compaſſe of *abuſing Gods name & maieſtie*; though this were admitted to be ſuch *lightnes.* Fourthly, no lawe preſumeth ſo vncharitably, as though euery one *detected*, or *preſented of corrupt life*, were ſtraightway, of neceſſitie,

and in very deed, guiltie of ſuch crime: nor yet is it to bee intended, that moſt which be (in trueth) guiltie, will rather forſweare themſelues then confeſſe the trueth: conſidering the penaltie inflicted by courtes *Eccleſiaſticall*, are not very grieuous; and the chiefe end therein aymed at, is but an *inducement* vnto, & a *teſtification* of the delinquẽts repentance. Fiftly, euery one who vpon a *fame* is *detected* or *preſented*, cannot be truely ſaid, to be thereupõ *diffamed*, *infamia iuris*. For a fame may riſe, yea, & very probable cauſe of ſuſpition of a crime, may alſo be giuen; where, neuertheleſſe the fact is not at all committed. Laſtly, it is not euery perſon ſuſpected of any crime, who in diſcretion of the *Magiſtrate*, is not to be vrged with an oathe: but it is ſuch an one who is probably ſuſpected; to be more likely to forſweare himſelfe, then to confeſſe a trueth.

But herein he preſſeth vs yet further, with a piece of old counſell, viz. *Dedecus magis quàm periculum vites.* Whoſoeuer giues this counſell, if hee ſhoulde meane, that the *perill of a mans ſoule* were rather to be embraced, then any *worldly ſhame*: it were very vnſounde, and wicked counſell. For it is better, to looſe, not onely our whole credites in the worlde, yea, & all the world beſides, rather then our owne ſoules. It is (in trueth) but an exhortation vnto valor, and courage: and that a man in a good cauſe, ſhould rather incurre any bodily perill, then empaire or diſtaine his honor, and loyaltie to his countrie, by cowardiſe. Beſides, in matters *ſpirituall*, and belonging to the *ſoule*; there is a *ſhame* which bringeth honor, as *Eccleſiaſticus writeth*.

He inueigheth alſo againſt them *ex abſurdo*: becauſe *if purgations ſhould be vſed* (he ſaieth) *at the Common Lawe* vpon *Enditements of felonie, or other criminall cauſes; periurie would ouerflowe the land.* I am alſo of this minde, that if for matters of life & death a man might be acquited vpon his owne oathe, and his *Compurgators*: that many wilfull periuries would be committed. But othes of purgation bee not impoſed, any more at the *Eccleſiaſticall* lawe, then they be at the Common lawe, in any matters *capitall*. And as *purgation*, is onely *a preſumptiue* kinde of clearing, to remoue the offenſe, & for ſafegard of his credit, who being infamed, can iuſtly and truely performe it: ſo is it no ſuch finall acquitall, but that the *partie purged* may againe be conuented for the ſame: if any man (by lawe allowed) will vndertake the

proofe,

proofe, not of the *fame*, but of the very crime and offenſe it ſelfe, whereof hee was afore purged. As for other *criminall cauſes*, which endanger not *life*, nor *limme*: diuerſe *Temporall courtes* (though not *vpon Enditements*) without ſuch feare of driuing men to periurie, do miniſter, & vrge the parties othes, as hath bin ſhewed. Yet not holding them purged, or cleared thereby, albe-it they deny the crimes; but *enquiring* further, and *examining* witneſſes alſo afterwardes, touching the trueth of the offenſe. Beſides, ſuch othes be miniſtred in thoſe *Temporal* courtes, vpon no detection of *fame*, or other *preſumption*, grounded vpon the othes of any: but vpon the priuate vindicatiue minde of him, which putteth in the bill, and proſecuteth. Laſtly, there bee fewe or none of the crimes called *tranſenntia*, and not *capitall*, which be enquirable in any courtes temporal: or if any be, they are not (in their owne nature) ſo ſecretly and without poſſibilitie of direct proofe performed: as the crime of *incontinencie* is; touching which, moſt *purgations* fall out in *Eccleſiaſticall* courtes. There was therefore ſmall cauſe of that his queſtion here, viz. Why *Eccleſiaſtical courtes offer not to the laitie, the like good meaſure, and vpright, and ſincere Iuſtice; that themſelues finde in courtes temporal?* Beſides that by the ſame queſtion, hee indirectly alſo taxeth all courtes whatſoeuer, that impoſe othe on the partie; for *want of good meaſure, and of vpright and ſincere Iuſtice.*

Vpon the former reaſons againſt *purgation*, he groūdeth another queſtion alſo, viz. *Why theſe ordinaries (which challenge, or aſſume to themſelues the goodly name, and title of ſpiritual men) doe not proceede to condemnation, by good proofe of lawfull witneſſes: and againe abſolue the partie diffamed, where ſuch ſufficient proofe failes them?* I anſwere, firſt, *Ordinaries* doe not in theſe dayes, eyther *challenge*, or *aſſume* to thēſelues ſuch *goodly name*, as he ſolaceth himſelfe at: but rather, the title of *perſons*, or *Iudges Eccleſiaſtical*. In deede, that other name (in times paſt) was willingly embraced by the *Cleargie*: and (as they thought) without any iniurie to other callings, in reſpecte of the *ſubiect* matter of their profeſſion, which is *ſpirituall*. And by no mans writings or ſpeeches, is it more often attributed vnto them, euen vntill this day; then it is in ſtatutes of the Realme, in reportes, and vſuall ſpeeches at the *Commō law*. Therefore was there ỹ leſſe coloure, that *Ordinaries* ſhould be vpbrayded with it: as if they of their owne heads

did vainely arrogate, that title vnto themſelues. Secondly, *Ordinaries* doe in all cauſes not confeſſed; proceede to condemnation vpon *witneſſes*, and *matter of Recorde*: or vnto abſolution, vpon fayling in proofe: ſauing in crimes, which be of that ſecrecie in their owne nature; ſo as witneſſes of the very crime, by no likelyhood can be had: yet alwayes, where ſuch probable *inducements* thereof doe lye; as doe inferre *a fame*, or giue *ſcandall* to the well affected, and are euill examples to the weake, and vnſtayed. Thirdly, if no *condemnation* of a man be iuſt in any court; but vpon good proofe of lawfull witneſſes, depoſing of their owne ſightes and knowledges; then doeth he withall impugne, the vſual, and lawful *Iuſtice* of this land, by *Iuries*: who in crimes of very high qualitie, are often, & may be led, ſometimes by one witnes: yea, and he, the partie that preferres vp the *Inditement*: and ſometimes though by moe witneſſes then one; yet all depoſing vpon *probabilities, preſumptions*, and other pregnant, or likely *inducements*, to proue the partie to be guiltie. Likewiſe he ouerthrowes alſo hereby, *all waging of law* by the parties *Iudicial othe*, taken in courtes of the *Common lawe*, about chattels, debtes, and landes. For a man hauing but two handes of *Compurgators*, ſwearing for the trueth of his oathe, vpon their owne credulities: ſhal be thereby relieued and acquited againſt his aduerſarie, without any witneſſe at all. For the *Treatiſour* himſelfe telleth vs; that *wager of lawe* is not permitted, where any one witneſſe, or writing may bee had. and if the partie will not take ſuch oathe, being offered; then is he (without *witneſſe, writing*, or other *confeſſion*) condemned for the matter, in demaunde. Now, ſauing that it is not in a cauſe *cryminal*; what doeth this *wager of lawe* elſe, differ from a *purgation*? and what leſſe danger of *deadlines, poyſon*, or *periurie*, is there herein, eſpecially, if the matter be of any weight and moment; then there is in *purgations*, at the law *Eccleſiaſtical*? and yet neuertheleſſe, both of them be *good meaſure, vpright, & ſincere dealing, in all courſe of good Iuſtice*. Laſtly, if in crimes of that hidden nature, he would haue all *diffamed* perſons without more adoe, diſcharged and abſolued; where two witneſſes of the very fact cannot be had: he might then in ſteede of feare, that *periurie* (in the other caſe) *would ouerflow the land*: ſtand wel aſſured in this, that adulterie, and lecherie, might, and would more freely ouerflow it, without all touch or cõtrolment.

Admit-

Admitting that which the *Treatiſour* further alledgeth, out of the *grieuances* of *Germany* to this purpoſe, to be truely by him ſet down: yet there is nothing there obiected, which cõdẽneth theſe *purgations*. For the firſt fault there found, is only, for that men vpõ falſe reports & ſclanders being brought before Ordinaries, & hauing *purged* themſelues; do neuertheles pay for their letters of abſolution, which ought rather to be paid by ſuch, as falſly accuſed them. Whether any ſuch thing were practiſed then in *Germanie* or no, I know not. heate of oppoſition, & ſharpeneſſe of humour, makes men ſometimes, either wilfully, or by miſtaking, to miſreport matters hapning euen at their owne doores. But I ſtand not to defend abuſes, by any man offred againſt law. The law is, that vpon an *accuſation*, a man ſhall not be put to oath of *purgation*: except the proofes made (though they do not conuince) yet doe greatly burthen and charge him, by vehement *preſumptions*, or *ſcandall*. And if he do then purge, & cleare himſelfe, the accuſer is to be condemned in charges. And though by *Accuſer* here, any priuate *proſecutor* were to be vnderſtood, yet (vpon the *purgation*) euen ſuch muſt likewiſe, defray the charges; becauſe it is *calumnia preſumpta*. But if *publike Officers*, that are appointed to preſent, do make *denunciation*; then are they to pay no charges: vnleſſe not onely the *preſumed calumniation*, and *conſpiracie*; but alſo, a true and *formall calumniation*, be found againſt them.

The next grieuances there pretended, & by him alledged, are: for that vpon *diffaming* one of another through anger; both the partie that did diffame, muſt take oath, that what was ſpoken by him, was not deliberately, but vpon diſpleaſure vttered: and the partie diffamed, that hee or ſhee, is not an adulterer, &c. as they were by the other ſlandered to be. whereby is inferred, as inconuiences; that both vnlawfull gaine, is thereby ſought, and wilful periurie forced.

It is no maruaile in deed, though ſuch, & greater inconueniences alſo ſhould happẽ, where due proceeding in law is not obſerued. for neither of theſe two laſt courſes, is warranted by any law, nor yet followed by any practiſe in this Realm, ỳ I know, or haue heard of: therfore *culpa teneat autores*. So that *Purgation* in it ſelfe, is not aſſigned (we ſee) for any of thoſe *Germaine grieuances*.

But becauſe the *Treatiſour* ſurmiſed, his reaſons could not o-

therwiſe be anſwered, nor *Purgations iuſtified*; vnleſſe *Compurgators* (who concurre in that action, & ſwear vpon *their credulities*) were thereunto vouched, to help the cauſe: therfore to meete alſo with this point; he ſaith, *the matter is therby no whit* amẽded; but rather made worſe, & empayred. *becauſe compurgators do* (in effect) *iuſtifie him to be honeſt, whoſe fame, & the former deponẽts haue proued to be diſhoneſt, & very neere* (*the circumſtãces conſidered*) *conuinced of the crime obiected?* where may be obſerued, howe light account ſoeuer elſ-where he doe make of *fame* without direct proofes; & therfore would haue the partie diſmiſſed, wout more adoe: that neuertheleſſe, he maketh it here, to be *very neere a conuiction*. Albeit a *fame* and thoſe who depoſe thereof, do burden and charge a mans *honeſtie*: yet doe they not conuince him of the fact, and therefore do not proue him to be *diſhoneſt*. Furthermore, the number of *Compurgators* cannot *make worſe* nor *impaire* (any way) either the credit of the man, or of the matter: though it were granted, that there oathes (for his reaſon afore alledged) were raſh, and vnconſiderate. wheras, in trueth, the *fame* or ſuch like inducement, being but a charge, importing ſome *preſumption* againſt the partie: is moſt aptly cleared, and taken away as with a more ſtrong *preſumption*, viz. by the partie himſelfe, who taketh oath of his owne innocencie from the very fact: & is beſides aſſiſted with the oathes of ſundry others (who are priuie to his former conuerſation, and feare of God) depoſing vpon their credulities; that weying the whole matter indifferently, they verily thinke the *partie* hath taken a true oath. Againe, if by *fame*, and by the *preſenters* oathes therof, the partie be in deede *proued diſhoneſt*: why doth he ſay, that it is but neere vnto a *Conuiction*? for if *diſhoneſtie* were thereby *proued* by him; why ſhould he not alſo ſtand thereupon *conuicted*? But I would haue thought till now, that none who thinketh reuerently, and but as he ought of the *common lawes* of this his owne countrey, howſoeuer he do of all other: could thus abſolutely, and aduiſedly haue condemned all kinde of *purgations* by oath, for what (I pray) is *wager of law*, (as I ſaid afore) differing from *purgation*; but that this concerneth matter of our good name, and credit, and *wager of lawe*, is touching our *lands*, or *goods*?

Neuertheleſſe, the *common* law is not wholly deſtitute neither,

of

of example of this *purgatorie oath*, euen in matter of *ſecrete crimes*. For the party *appelled* of murder or robberie, who putteth it to triall by *battel* (as hath by other occaſion bene afore alledged) before the combat, muſt take an oath; that he hath not cõmitted ſuch offence. and heerein the lawe yet reſteth not, but requireth alſo afterward, a further *tryall by battaile*, betwixt them: whether the *appelled partie*, will thereby fall out to bee tried cleare, or culpable. And if either the partie appelled refuſe the one, or be vanquiſhed in the other: the lawe pronounceth and holdeth him for a man conuicted of the hidden crime it ſelfe, that was imputed to him. If [1] this oath of *purgation*, with ſuch further *triall*; being both of *deadly* danger, and of great doubt, (when all is done) in a matter *capitall*; yea and vpon the *appeale*, or *accuſation* of another; bee but *good meaſure*, *ſincere*, *and vpright iuſtice*, a trier, and *preſeruer* of innocencies, not *hurtfull*, *but healthfull* to the common weale, nor no *poyſoning purgation*; whereof (I hope) the *Treatiſour* will make no ſcruple: then, where the *purgation* for a ſecret crime, and vppon no leſſe preſumptions is impoſed, not by an *enemie*, or *accuſer*, but by the *Iudges office*; not importing any danger of *bodily death*, but tending to the good of his ſoule, and ſatisfaction of other *Chriſtian* mens conſciences, wounded, and grieued; there muſt needes bee much leſſe cauſe of any ſuch challenge.

[1] c. 1. & 2. de purgat. vulgari. 2. q. 4. c. monomachiam.

For further iuſtifying of *Purgation* by the parties *oath* with *Compurgators*: I minde not to alledge the authoritie, either of *Canon* or *Ciuill* lawes, becauſe they are like with ſuch great facilitie to be reiected by him. For he ſaith, that it is no matter what *their lawes* preſume or teach; but with what reaſon they doe it. Well, there bee not a fewe, nor thoſe vnwiſe nations in the world: where the authoritie of the lawes hee meaneth is ſuch, as that they are euen *preſumed* and entended, to be grounded vpon *good reaſon*: albeit *a reaſon* of euery law, cannot well, and aptly be yeelded, as thoſe lawes doe teſtifie.

The receiued vſe of this *purgation*, amongſt moſt *Ciuill* nations; doth make it to be little leſſe then *Ius gentium*. and therefore by moderate and graue men, it is not meete, ſo lightly, and ſlightly without good grounds, to be condemned.

Besides, *purgation Canonical*, is so farre from being condemned by good, & godly *Bishops* in ancient times: that by whole *Councels* it hath bene prescribed. *Let* [1] *a lay man* (saith one *Councell*) *if neede be, purge himselfe by his oath: and let a priest by the Consecration of the holy Sacrament be interrogated.* And another *Councell* thus: [2] *Let a Priest (if he can) purge himselfe of the crime with seuen of his order: and a Deacon with three.* So was it decreed by a third *Councell*: [3] *if a Priest or minister, be infamed amongst his charge, and it cannot be proued before the Bishoppe, by witnesses; let him bee suspended, vntill he performe due satisfaction, least the faithfull people be scandalized. But (as our Elders haue taught) then is the satisfaction due, and orderly, when according to the Canons, or as the Bishoppes shall iudge fitte, he ioyneth vnto him seuen Compurgators, and sweares by the holy Gospels laid afore him, that he hath not committed the crime laid vnto him, and when he is thus purged, then let him againe freely execute his office.* And in another [4] *Councell*, we finde *purgation* prescribed for *theft*, and also for *adulterie*. Besides these, sundrie others also might be alledged. and according to the prescription of such *Canons*; examples haue gone, for sundrie ancient *Bishops* in the *Church*, haue themselues made their owne *purgations*, for auoiding, or remouing of *scandal* & offence. [5] *Sixtus*, the third, an ancient *Bishop* of *Rome*, but vpon the *accusation* of one *Bassus*, did willingly make his purgation vpon his oath in a *Councell*; which (in that case) was more then he needed to haue done. And so did [6] *Leo* another ancient Bishop of the same *See*, purge himselfe with twelue *Bishops*.

Gregorie the great enioyned vnto [7] *Leo*, [8] *Memnius*, and [9] *Maximus* three *Bishops*, to cleare & purge themselues of seuerall crimes by their oathes: whereof the last was for *Simonie*. *Innocentius* also caused the *Bishop* of *Trent*, to purge himselfe of the like crime of *Simonie*.

And what be the oathes, touching goods stolne, or embezeled which were left with a man vpon trust; appoynted in [10] *Exodus*: and those in *Salomons* prayer, at the [11] *dedication of the Temple*: other then oathes of *purgation* of a crime, imposed by the partie, hauing an interest? Likewise, the oathes mentioned in [12] *Leviticus* concerning goods denied, that are pretended to haue beene left *in deposito*; or goods gotten by *rabberie*, or by *violent oppression*;

or

[1] Concil. Tribur. Can. 21.
[2] Iuo. li. 5. ex Concil Agathensi.
[3] Iuo. ibidem ex Concil. Ilerdensi.
[4] Concil. Wormac.
[5] 2. q. 4. c. mandastis.
[6] Iuo. Car. li. 5.
[7] Greg. ep. 23. ad Iustinum. presbyt.
[8] Idem. ep. 8. li. 2.
[9] Idem. ep. 8. li. 7. & ep. 79. li. d.
[10] Exo. 22. v. 7. 8. 10. 11.
[11] 1. Reg. ca. 8. ver. 31. 32.
[12] Leuit. 6. ver. 2. 3. 4. 5.

or caſually *found* after they were loſt, yet by the finder denyed; are they not for *purgation*, and clearing of the partie, from the crimes imputed? and (in ſome reſpect alſo) *deciſorie* of the whole controuerſie; vnleſſe ſound proofes touching the true guiltines of the partie, may be afterward found out and vſed?

Againe, the [1] oath of *ielouſie* taken with a further ſolemnitie of *purgation*, and impoſed by the *Prieſt* a publike *Magiſtrate* in that behalfe: is an oath not onely of *Enquirie*, but of *purgation* to the woman *denounced* for ſuſpition of *adulterie*, by her huſband. Laſtly, the [2] oath impoſed by Gods lawe vpon the *Elders* of the Citie ſituated next vnto the corps of a man which is found ſecretly murdered: is a plaine and moſt direct oath of *purgation*, euen in a *crime* (in his owne nature) *enill*, & *capitall* to the offenders.

[1] Num.5.v.14.&c

[2] Deu.ca.21.v.1.

To conclude therefore; we doe finde it lawfull, and *godly*, ſometime to make further *Enquirie*, and *tryall*, then a defendants owne oath, who thereupon denyeth the matter: and that *purgations Canonicall* bee conuenient, allowable, and manifoldly lawfull, yea, by the very worde of God it ſelfe.

The Epilogue *vnto him, for whom the firſt draught of this* Apologie, *was priuately addreſſed.*

THus haue I as plainely as I could, and as briefly as the matter would ſuffer (in my rude maner) ſhewed vnto you, my ſimple opinion, in the points aforeſayd, lately called into controuerſie: and (by the way) in others alſo, wherein you haue ſo earneſtly (almoſt) importuned me to trauell. If it doe (but as it is like) not ſatisfie you; impute it to the ſhortnes of time, lacke of good leiſure, and chiefly to your owne bad choiſe of me. If any thing be miſtaken by ignorance, or ouerſlipt (as I doubt not but very much is, and may be) keepe you promiſe with me: and let this ſimple *Treatiſe* haue no more, nor other readers of it, then I wiſh. and ſo ſhall I haue leſſe cauſe to doubt, but that the cenſures of it, will be nothing ſo ſharpe, as (I feare) they may be iuſt, for want of skill in me, to deale in matters of this qualitie.

FINIS.

QVÆSTIONIS:

NVNQVID PER IVS Diuinum, Magistratui liceat, a Reo Iusiurandum exigere? & id, Quatenus ac quousque liceat?

Theologica Determinatio:

Habita
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mense Iulio, Anni
1591.

Per LANCELOTVM ANDREVVS
S. Theologiæ Doctorem.

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NVNQVID PER IVS diuinum Magiſtratui liceat a Reo *Iuſiurandum exigere? Et id, quatenus* ac quouſque liceat?



E quæſtione in reos habenda ſub religione iuramenti, déque eius per reos vel ſuſceptione, vel declinatione legitima; nuper quæſitum eſt: *Nunquid per ius fáſque diuinum, Magiſtratui liceat à reo iuſiurandum exigere; & id quatenus, ac quouſque liceat?* Eam ego quæſtionem, ne qua memorię veſtrę, ne qua meæ confuſio fiat; ſic pote, quaſi quinque in propagines, diductam volo. Neque verò in hoc tam ſuccincto bidui ſpacio, methodus mihi magis diſtincta, in mentem venit. [1] An exigere iuramentum liceat? [2] An Magiſtratui liceat? [3] An à parte rea id liceat? [4] An omni in cauſa liceat, an verò non in Capitalibus, ſed quæ mitiore pœna luuntur? [5] Quouſque hoc liceat, & quatenus? E quibus priores illæ tres quæſtiones, nihil quæſtionis habent: ſi ſani ſumus in Theologia. Expediam ergo paucis.

Ac primùm, exigi licere iuſiurandum ius ſacrum eſt. qua in re, plurimum intereſſe puto, (quod *Chriſtus* fecit in cauſa diuortij) qualis quæque res ab initio fuerit, id primum inquirere. Ætatis flexu multa mutantur: Principium Index certiſſimus. Quæro igitur, vbi, & quando, prima iuramenti mentio in ſacris literis? Reperio Gen. 24. *Abraha* ſcilicet adigentis ad iuſiurandum ſeruum ſuũ ſub hijs verbis, hácque cæremonia: Pone nunc manum ſub femore meo, vt iureiurando te obſtringam, accepturũ te vxorem filio meo, è cognatione mea. Ita; quod primum eſt in ſacra pagina iuramentum, expreſſum eſt. 1

Ac vt antiquiſſima & prima; ita frequentiſſima & penè ſola huiuſce mentio. Hoc ipſum (*iurare,*) vix reperias vſquam in Teſtamento veteri, niſi vel ſub *Hiphil:* i. coniugatione præceptiua, ratione deferentis: vel ſub *Niphal:* i. coniugatione paſſiua, ratione ſuſcipientis. Eodémq; iure & Græci ſunt, apud quos ὅρκος, Iuramenti nomen eſt; quod ferè ſolum in Teſtamento Nouo Spiritus ſanctus agnoſcit. Eſt in ea voce coarctans quædam neceſſitas, & (vt loquuntur) exigentia, non minus quàm in ἀρὰ. Ab eadem enim voce, vox vtraque, nempè ἀρᾶσθαι, coarctandi. Móxque prouerbio decantatum eſt, ὅρκοι καὶ πόλεμοι, Bellum & iuſiurandum, ἀναγκαῖα κακά, i. ſpontanea mala eſſe: & vt bona ſint, ἀναγκαῖα, eſſe debere; id eſt, *preſſa & expreſſa* (vt ſcitè *Auguſtinus* de iuramentis) *vel auctoritate deferentis, vel ſaltem duritie non credentis.* Vt niſi aliquo ſaltem modo, atque aliqua (nec leui) cauſa, exigatur; peccetur, tum iureiurando, tum belligerando. Exigi ergo poſſe, vel debere potiùs; ipſa naturæ, ipſa vocis vis, euincit.

2 Sed nunquid à Magiſtratu? (ſecunda iam hæc propago eſt.) Certe à magiſtratu.

Sic olim Theologi, Non modò quodq; corpus, ſed animam adeo quamq;, Poteſtatibus ſubiectam eſſe, Rom.13.1. Eſſe igitur Poteſtati, factam poteſtatem, vt corpus tradat cuſtodiæ incarcerando, ne quò aufugiat: Eſſe itidem, vt animam quoque tradat cuſtodiæ ſuæ, iureiurando, ne quò ſcilicet ſubterfugiat. Quo nomine aptiſſimè Deus ipſe dixit, Iuſiurandum אִסַּר נֶפֶשׁ i. animæ vinculum ſiue carcerem. Nu.30.13. quo quaſi conſtringatur anima: conſtricta appoſitè & expeditè reſpondere teneatur. Verùm intro adhuc magis. Si Domino hoc licet in ſeruum, vt *Abrahæ*, Gen.24.3. ſi patri in filium, vt *Iacobo* in *Ioſephum*, Gen.47.29. ſi fratri in fratrem, vt eidem *Iacobo* in *Eſauum*, Gen. 25.33. nempe adigere ad iuramentum: Vtique meliore id iure licebit Magiſtratui in ſubditum, cuius imperium omni alio imperio excellentius eſt. Addo etiam, ſi de ritè collocando in matrimonium filio, id liceat, vt *Abrahæ* ſeruum: ſi de commodo ſepulturæ loco deligendo, vt *Ioſephum*: ſi de iure primogenituræ tranſigendo, vt *Eſauum*; priuatis in cauſis, addo etiam & minutiſſimis, ſi cum publicis conferantur: vtiq; meliore hoc iure licebit magiſtratui, in communi Reipub. cauſa, cuius intereſſe, eſt maius omni alio intereſſe.

Idq; cautũ eſt lege diuina, Exo.22.8. diſertis verbis. In cauſa depoſiti, ſiſtant ſe coram Magiſtratibus, ait Deus. Quo in loco, Dei ipſius nomine, nominãtur Magiſtratus: Nec quouis nomine, ſed illo ipſo quod ab אֱלָה -- i. *adiurandi vi* tranſumptum eſt. Quaſi dicat, Coram Iuratoribus ſe ſiſtant, aut ijs, qui (cum Dei vice, ius dicant) in iudicio ipſius, ipſius nomine, iuramentum ipſius exigere poſſunt. Nempe Vicarij Dei, Pſal.82.6. in iudicio Dei. 2.Chr.19.8. iuramentum Dei. Eccl.8.2. Magiſtratui ergo licet; Magiſtratui (dico) cùm Eccleſiaſtico, tum Ciuili. Coram illo, nempe Eccleſiaſtico, lege purgare ſe *iuramento* iubetur mulier, in cauſa ſuſpectæ fidei coniugalis. Nu.5.19. Coram hoc, Ciuili ſcilicet, lege purgare ſe iuramento, iubetur vir in cauſa ſuſpectæ fidei ſocialis. Exo.22.8. Cuius praxim videmus (eſt autem *praxis ſanctorum, interpres præceptorum*) Eccleſiaſtici quidem in *Eſra*, qui iuramentum exegit in cauſa matrimonij, Eſr.10.5. Ciuilis vero in *Nehemia*, qui ad iuramentum adegit in cauſa fœnoris, Neh.5.12. Neque verò Magiſtratui ſolùm pio & religioſo, hoc iuris eſt; verùm & Ethnico; idque in populum Dei. Præſtitit *Nebucadnezzaro* iuramentum *Zedechias* de fidelitate præſtanda. 2.Chr.36.9. adactus præſtitit; ritè tamen ſi *Ezechieli* credimus. idque cum pòſt, auſu ſacrilego, violare tentaret; non tulit impunè. Ezech.17.13. Addo denique; Non hoc tantùm illis licere in populos ſuos; verùm & in hoſpites ac peregrinos quoque, intra ditionem ſuam, ſiue commercij, ſiue alia de cauſa hærentes. Quo ipſo nomine, *Ioſephus AEgypti* iam prorex iuramentum defert fratribus ſuis, etſi legibus & natura Chananæis, in cauſa ſuſpectæ proditionis. Gen.43.3. Ex hoc ergo iam liquet; tum exigere licere, tum licere etiam Magiſtratui.

3 Sed vtrúm-ne à reo? (Quod ſum pollicitus tertium.) Nec id in dubium vocari poteſt. Ex.22.8. Depoſitarius pars rea eſt. Num.5.19. Mulier viro zelotypo ſuſpecta violati thori, pars rea quoque. At vtrique defertur iuſiurandum, nec declinare fas fuit. Paucis complectar: ſiue quis dolo rem proximi inter-

uortit,

uorit, siue mala fide amici rem procurauit, siue rem repertam, repetenti non restituit, Leu.6.3. siue (vt mihi quidem videtur) vllo præterea in crimine (indefinitè enim ponitur, 1.Reg.8.31. אֵת אֲשֶׁר יֶחֱטָא --- i. quicquid peccauerit) licuit actori שְׂאֵת בּוֹ אָלָה לְהַאֲלֹתוֹ, id est, *iuramentum reo impingere*, vel *leuare super eo iuramentum* (*Hebraica* phrasi.) Nec reo detrectare licuit, ab actore quidem ipso, nedum à magistratu delatum. Equidem incidere non negem tempora, vt vel ipsi actori deferri expediat, non solum reo. vtrique namque præuaricari contingit; Actori, calumniando; Reo, tergiuersando. sed si ius, è cælo petimus, i. è sacris literis; reo magis. Exempla quidem ab ea parte ferè sunt. vix vnquam reperias in lege, delatum actori iusiurandum; Reo reperias quàm sæpissimè. Rationem reddit *Moses*: Actori (quippe qui plærunque pars læsa sit) incalescit animus, totus in fermento est, iræ, vindictę, maleuolentiæ æstro percitus, *acceleraret ore suo*; quod in iuramento vetat sapiens. Eccl.5.1. Quare inepta planè materia iuramenti. Reus, quem falsi criminis reum, lex semper autumat, quoad constet contrarium, multo aptior. Minus in eo præiudicij, minus affectionum, præter fortè timoris, qui ipse eos est quasi iuramenti. Quare, à reo exigi, & licet, & verò par est.

Accedo ad quartam: Qua tandem in causa isthuc par sit; quæ paulo spissior est, & plus quæstionis habet. Ac causarum quidem non aliundè diuisionem petam, quàm è iure nostro: id est, Theologorum. Ibi, lege sacra, aliæ, דְּבָרִי --- פֶּשַׁע id est, Noxæ seu præuaricationes censentur. Ex.22.9. aliæ מִשְׁפְּטֵי --- מָוֶת id est, causæ capitales. Deu.21.21. Quarum atroces hæ, vita quidem sanciuntur: vita, siue *naturali* morte moriatur: siue *Ciuili*, id est, exilio: seu (vt sacræ literæ loquuntur) eradicatione. Esr.7.26. (Quibus congeneres sunt מִשְׁפְּטֵי דָמִים, id est, causæ sanguinariæ: quales erant, Deu.25.12. Membri amputatio; & ibidem versu 2. plagarum inflictio. Illæ vero alteræ non perinde graues, partim pecuniarum mulcta constabant, עֲנַשׁ נִבְסִין, partim vinculis אֲסוּרִין Esr.7.26.

Ecquis in ijs quę capitis sanguinisue pœna luuntur, iuri iurando locus? Non sanè suadeo. Primùm, scripturæ praxis contrà venit. Video enim, cum de *Achanis* capite ageretur, *Iosuam* sic agentem: *Narra mihi fili mi*; *non iura mihi*. Cum de *Ionathanie*, *Saulem* identidem: Dic mihi *Ionathan*: non deiera mihi. Spontanea, non expressa confessione; interrogatione simplici, non religione iuramenti. Quin (quod caput est in hac quidem causa) video prophetam ipsum *Ieremiam* ab ipso rege interrogarum, *Peto abs te verbum, ne celato me illud*; stipulante, (nec id sanè sine spiritu dictante) *Tantùm ne capitale mihi sit responsum meum*. Ac si in ijs quidem causis immunitatem Deus dedisset respondendi. Iere.38.14. Ac ratio quidem fauet. Sic enim (quoad eius fieri potest) quæstiones à Magistratu habendæ sunt; vt manifesta absit iactura animarum. Cúmque ex ore maximè mendacis, illa vel maximæ veritatis sententia prodierit, (*Pellem pro pelle, & quid quid est viro, daturus est pro vita sua. Iob.2.4.*) verendum, ne illud (*Quicquid*) tum conscientiam ipsam iuramenti, tum timo-

morem numinis, tum quicquid præterea religionis est (vt homines sunt, vtq; mentem habent) comprehendat. Quare, etsi nihil definio: tamen (nescio quomodo) in hijs quidem causis, propter periurij periculum præsens, iuri-iurando parcendum censeo; legésque quibus vtimur (καὶ συνήθειαν saltem idem hoc cẽsuerunt. In alijs verò ijs, quæ minore noxa cum sint, mitiore pœna plectuntur; non censeo. Nisi fortè, comicum quoque illud iam in Theologia receptum sit: *Iuramentum rei seruandæ, non perdundæ conditum est.* Cautum est enim lege generali, Leu. 5.4. *Quod qui iurauerit siue bene se facturum, siue male id fuerit; teneri debitorem, vt faciat*: Idq; cum de *malo culpæ* intelligi nequeat (vt in scholis loquimur) *ne sit enim sacramentum pietatis, vinculum iniquitatis: in malo pœnæ* teneat necesse est. quo in genere nec renuere iuramentum licuit, nec datam in eo fidem pòst rescindere.

1 Non renuere: Sciens prudens exegit à *Schimeio* iuramentum *Solomon*, in damnum libertatis suæ; ne quò se scilicet proriperet trans *Cedronem*; legitimè exegit. cúmque post *Schimei* (iuratus ne transiret) transijsset tamen: capite luit, & licitè quidẽ luit, non tam transitu *Cedronis*, quàm iuramenti sui, 1. Reg. 2.43. Quid quæritis? Quanquam prophanus *Schimei*, iuramentum nullus detrectauit; etsi in dispendium libertatis suæ. Neque verò *Micheas*, qui iuramẽti religione obstrictus à rege; (neque aut semel id, aut tum primùm, sed aliquoties ante factitatum) quod solutus renuit, adiuratus non renuit, sed respondit; etsi certa illi pœna ante oculos, etsi amandandus ob id responsum in domum carceris. 1. Reg. 22.16. Quo exemplo, tum id constat, in more institutóque positum fuisse *Israeli* in responsa iurare: tum id, quanquam prophetam *Micheam*, non ausum tamen (inscitiâ id fortè iuris diuini) quod nos hîc hodie facimus; aut stipulari, ne fraudi sibi sit iuramentum suum, libertati suæ; aut si id non detur, tergiuersari.

2 Non rescindere: Quod ipsum summo scilicet argumento est, legitimè præstari. Nam ni ita sit, Rectè *Augustinus: Iniusta vincula, rumpat iniustitia.* Non erit (spero) deteriore iure magistratus, quàm quiuis de plebe. Atqui priuati cuiusque ea demum virtus non infima; Si iuratus in damnum suum, non mutet tamen, quod vicino pepigit. Psal. 15.4. &, si non, quod vicino; nec quod Magistratui: Meliori quidem iure, pari saltem. Quid quæritis? quanquam prophanus *Esau*, iuramentum nullus reuocauit, etsi in dispendium hæreditatis suæ. Verùm enim, vt quo iure sint priuati, hac in re semel sciant; neq; regi fas istud. Iurauit in damnum suum *Zedechias*, idque prima facie; seruitutem scilicet, tum suam, tum populi sui. Ezech. 17.13. mutauit; sed & detestante factum Deo, & vindicante. Neque verò reipublicę. Respub. *Israëlis*, iuramenti interuentu, fœdus cum *Gibeonitis* sanciuit. Contrà venit illud, tum commodo suo, tum politico Dei præcepto. Non censuit mutandum, rectè censuit. Ios. 9. 15. Idémque cum *Saulus* posteà mutandum censeret, etsi zelo id *Israëlis* factum, periculo id primùm regni sui, excidio pòst posteritatis expiauit. 2. Sam. 21.2. Non regi, non reip. nec priuato igitur. Concludo iam; Abfit modò capitis periculum: in rebus causísque, quæve mulcta, quæve carcere plectuntur; Et subdito præstare iuramentum fas esse; & magistratui postulare.

3 Verùm in eo hæsitationis plurimum; hoc ipsum quousque liceat, & quatenus. Quod ego dum expedio: actio mihi tota, siue (vt loquuntur) *processus iudicialis*

dicialis obeundus eſt; vt, qua tandem prodire tenus, vbi non datur vltrà, cognoſci poſſit. Ac illius quidem (quod ad præſens hoc inſtitutum noſtrum attinet) partes tres: quas hijs nominibus in ſacris literis deſignatas video. Prima, Admiſſio litis, מוֹבָא ריב dixere *Hebræi*: id eſt, ingreſſum cauſæ ad iudicium; ex Eſaiæ 1.23. Diuus *Paulus* παρέδειξιν ἐγκλήματος. 1.Tim.5.19. Secunda, Status cauſæ, eiúſque poſitio מִבּוֹנַח ריב, id eſt, baſin litis *Hebræi* nomen fecere, ex Deut.19.13. *Græci* τὸ κεφάλαιον. D.*Paulus* (ni fallor) αἰτιολογίαν vocat. Heb.6.16. Tertia, Probationum inquiſitio חִקּוֹר ריב, id eſt, perueſtigationem litis *Iudæi* appellant, ex Iob. 29.16. *Græci* κατανόησιν: D. *Paulus* βεβαίωσιν. Heb.6.16. (Nam cum quarta, quam פְּתַגָּם, id eſt, ſententiam omnes vocant, nihil mihi negotij.) Tria ergo hæc inſunt in omni iudicio; Legitimè quis vocari in ius debet: Pòſt ſtatus cauſæ fieri: Probationes demùm inquiri.

Ac in prima quidem, haud vllus (quod ſciam legerímue) iuramenti vſus. De ea tamen vt inquiram, facit quorundam error, minuendus mihi hodiè (ſi fieri modò poſſit) qui non ſatis ſibi accuſati, imo qui ſeipſos accuſaturi ſibi videntur; niſi prodeat in medium ac conſpectum accuſator quiſpiam: quíque, quod ab ijs iuramentum requiritur, ad ſtatus poſitionem, id eſt, partem ſecundam; illud ad primam hanc, id eſt, litis admiſſionem requiri, falsò id quidem & temerè arbitrantur; ſed tamen arbitrantur.

Propono itaque ſic: Omni in lite, vel ita in aperto rem eſſe; vt conſtet tum de facto, tum de perſona: Siue ἐπ' αὐτοφώρῳ deprænſa ſit pars rea: id eſt, (vt loquuntur) in facti flagrantia, vt illa, Ioan. 8.4. ſiue ita manu elata, vel auſu (vt dici ſolet) notorio, vt coram magiſtratu cœtúque vniuerſo tentata fuerit, quale *Zamri* facinus, Nu.25.8. In quibus ita propalàm geſtis, nihil accuſatore, nihil teſte opus eſt: vel ſanè eiuſmodi, vt aut de facto conſtet incognita perſona, vt in cadauere reperto, cuius percuſſor ignoratur. Deut.21.1. aut de perſona quidem, incognito facto, vt in *Achanis*. Ioſ.7.18. Qua quidem in re ſic controuerſa, vocari quiſpiam in ius poterit, modis quatuor, ex diuinæ legis ſententia. 1 a b

Etenim vel indicijs prodi quis poterit, vt in prima illa iuſtitia diuina (quam humana omnis imitatur) actum eſt contra *Adamum*, ſine delatore, ſolis indicijs: quod ſe ſcilicet proripuiſſet in fugam, atque inter denſa arborum abdidiſſet (conſcij nimirum animi indicium.) Gen. 3.8. In ſecunda illa, contra *Caïnum*, ex indicijs itidem, (nempè *Abele* nuſquam comparente,) reperta effuſione ſanguinis, prægreſſa in *Abelem* ſiue ira, ſiue inuidia *Caïni*. Gen.4.6,10. Primus hic modus eſt. 1

Secundus; vel inſimulante altero prodi quis poterit; vt illa ipſa in iuſtitia prima, ſolus *Adam* citatus: ſed is in quæſtione (vt fit) *Euam* inſimulauit; *Eua* itidem ſerpentem. Gen.3.12. Atque ita illi quoque rei peracti ſunt. 2

Tertius, vel porrò infamia, (vt plærunque improborum facta ſuſpitio conſequitur, ſuſpitionem ſermo, ſermonem inſinuatio.) Atque ita ſcilicet, actum contra *Sodomitas*. Gen.18.20. *Clamor Sodomorum cum multus ſit; deſcendam & inquiram*, (inquit Deus.) Eodémque modo, quæſtiones habitæ, tum in lege: 3

Si perlata ad te fama fuerit, aut ſi fando forte inauſieris. Deut.17.4. tum in Euangelio, vt contra inceſtum. 1.Cor.5.1. *Hæc ἀκόντως.*

4 Quartus, vel denique *ſuggeſtione* ſeu querela, vt in *Iobi* cauſa. ca.1.11. vbi accuſator fratrum noſtrorum, (vt eum Diuus *Iohannes* nuncupat) ſanctum illum virum, hypocriſeôs, falſi quidem criminis, ſed tamen criminis, reum, fecit. Eáque partim iuridica; quo nomine fuerunt apud *Hebræos*, qui בַּעֲלֵי מִשְׁפָּט, id eſt, magiſtri litis dicebantur. Eſa.50.8. vbi pœna rei quæritur, vt læſæ parti ſatiſfiat, in cauſa iniuriæ: partim (vt loquuntur) *Euangelica*, qua Eccleſiæ denunciatur quiſpiam. Mat.18.17. vbi medicina tantùm rei quæritur, vt Eccleſiæ ſatiſfiat, in cauſa ſcandali. In prima, res ipſa loquitur (vt dici ſolet) reúmque inſimulat. In ſecunda, reus alter alterum. In tertia, populi vox delator eſt. In quarta, vnus quiſpiam, proprij veríque nominis *accuſator*.

Addo etiam hijs quintum adhuc, verum non (vt hæc) ordinarium expediendæ litis remedium; quin planè extraordinarium; nec adhibendum, niſi in valle *Achor*, id eſt, contra perturbatores *Iſraëlis* (hoc enim ſonat vox *Achor:*) nempè atroci aliquo in ſcelere, aut periclitante Eccleſiæ regníque ſtatu. In ijs enim decurritur ad extraordinaria, ad ſortes ſcilicet, à *Ioſua*, quod quibuſuis in cauſis, non datum eſt. Ioſ.7.16. In ijs, ſua ſolùm ſuſpitione fretus *Ioſeph*; *Ne vos exploratores eſtis* (inquit) *& ad nudas terra partes detegendas veniſtis.* Gen.43.9. Cúmque illi negarent, ſine indicio, fama, delatore quoquam; quæſtione habita, *Simeonem* detrudit in carcerem, reliquos adigit ad iuramentum. Nec illi ad ius gentium prouocant tamen, aut contra ius fáſque ſecum agi conquerúntur. Vbi enim de reipub. pace agetur, tanti illa eſt; vt non dubitem, Deum, ſuum Magiſtratui zelotypiæ ſpiritum permiſſurum eſſe, de ſalute *Iſraëlis* ſui: non minus quàm marito ſuum permiſit, de caſtitate coniugis ſuæ. Num.5.14. Nam & res de qua agitur in ſummo gradu periculoſa eſt, vt diſſimulari non debeat: & perſonæ, quibuſcum agitur, niſi conſcios ſuos, teſtes nullos adhibere ſolent, per quos argui poſſint. Et ſcelus ipſum, quo de agitur, ex eo genere ſcelerum eſt, quæ impreſſa poſt ſe veſtigia, aut notas non relinquunt, per quas manu teneri queant. Quare in iſtis non minus ſuſpitione ſola accuſare, quàm per Equuleum, Cippum, Scapham, quæſtionem habere fas: (cui rei fuerunt illa in diuina repub.) Quorum vtrumuis, in alijs, ſiue litibus, ſiue criminibus, nemo permiſerit. Rectè (ſi benè memini) *Seneca* rei rationem reddit. *Vbi ſcelera per abruptum eunt, iniquum eſt iuſtitiam ad gradus teneri.* cui non valdè diſſimilis eſt, (eius qui in ſcelere *Achanis* abrupto ad ſortes decurrit) quæſtio planè extraordinaria. Perturbari vult illos *Iſraëlis* Deus, qui perturbare nituntur *Iſraëlem* Dei: ciúſq; rei vallis *Achor*, perpetuum monumentum.

Ierc.29.26.

Iam verò quemcunque in ius vocarit magiſtratus, præeunte ex quatuor illis vno (aut, ſi de Reipub. Eccleſiæve pace agatur, quinto etiam) legitimè vocatus eſt. Nec eſt, quod metuat, ne ſe accuſet aut prodat; accuſatus iam & proditus legitimè eſt quod curet, quo modo ſe accuſatum ſic proditúmque, legitimè defendat. Atque hactenus de iure accuſatorio.

3 Aſſumo iam ſecundum. Re, ſic, ſub iudice, in dubium vocata, vel fatetur reus admiſſum ſcelus, quod fecit *Achan*; ac tum in confeſſum, nullę ſunt Iudicis partes, niſi vt ferat ſententiam: Vel, (quod ferè fit,) negat; quod elegan-

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ter inprimis expreſſit *Salomon*, Pro.18.7. *Iuſtus eſt, qui primus in lite eſt, donec ſuperueniente proximo, perueſtiget eum Iudex.* Negante iam reo per depulſionem, actore per intentionem affirmante, oritur *Paulina illa* ἀντιθεσία, de qua ad Heb.6.16. Cuius ἀντιθεσίας πέρας, ſeu contradictionis terminus, illud eſt, quod in omni iudicio quæritur, vt ibidem Apoſtolus animaduertit. Terminus autem nullus reperietur, donec in æquilibrio res; id eſt, niſi altera cauſa vberiorem habeat βεβαίωσιν, quàm altera. Apoſtoli ea vox eſt eodem in loco. Eam ergo, qua parte lateat inquirere, iudicis partes ſunt. Tenuis enim labor, tenuis laus, lites dirimere quæ in procliui ſunt. Illas, quarum obſcurũ ius eſt & perplexum, excutere; id demum Iudice dignum. *Cauſam quam non cognoui, perueſtigaui eam*, de ſe ait Iob cap.29.16. idq; ipſum dextrè commodéq; præſtare, honor eſt magiſtratus, ait *Salomon* Prou.25.1. Cui ipſi, honori ſummo fuit, ſententia, quam tulit in lite omnium difficillima, inter cauponas de incerta matre pueri ſuperſtitis 1.Reg. 3.27. At enim priuſquam adhiberi, aut debeant, aut poſſint βεβαιώσεις illæ, id eſt, probationum ſtatumina: ſtatus aliquis fiat neceſſe eſt, & quaſi cardo quiſpiam ſit, in quo cauſa vertatur, ac id, omnium primò conſtare, quid & quouſque affirmet hic, neget ille; in quo pedem ponere vterque ac ſeſe iure manu-conſertum, vocare poſſint. Dicit *Iudæus*, omnino prudenter dicit: *Ante omnia repone mihi litem ſupra baſin ſuam*, שִׂים רִיב עַל מְכוֹנָתוֹ. Quod ni facias, erit (vti aptè quidem loquuntur ex Prouerb.21.) actio tota תֹּהוּ נָבֶל, id eſt, mera vanitas, inter actorem & reum, hinc illinc, vltrò citroq; agitata. Quod cùm nec in ſcholis hîc ferri poſſit: multo minus in iudicio debet, cuius eſſe debet, ſacer ac ſolennis proceſſus omnis, ipſaq; iuſtitia iuſtitiæ, vt eſt Deut.16.20.

Κεφάλαιον iam hoc, ſiue ſtatus (ſeu quis appellare malit) ἀντιθεσίας πέρας, aut eſt ex parte rei quærendus, aut ex actoris. Non ex Actoris: Non poteſt ſæpe, quia is ſæpe nullus; vbi aut Indicijs quis in ius vocatur, aut famâ. Et cum eſt; tranſuerſus fere rapitur: ſiue odio, ſiue cupiditate aliqua obliqua impulſus eſt, ipſe vt ſine ſtatu ſit, vt fruſtrà ab ipſo ſtatum quæras. Quare reo facta hæc gratia, ſeu potiùs hic honor habitus eſt (qui & ſemper perſona eſt certa, quéque lex non conuictum habet, pro inſonte) vt ipſe ſibi ſua vel affirmatione vel negatione ſtatum figat: imo verò vt illius ſolo reſponſo totius controuerſiæ ſtatus fiat: nec ſtatus modò controuerſiæ, ſed (niſi falſi conuincatur ſub teſte duplici, omni exceptione maioti) controuerſiæ finis quoque. Sed enim ne ſtatu ſic à ſe defixo, ſi ſolutus & liber eat, ſtatui pòſt ſuo non ſtet; ſed tergiuerſetur, ac recedat ab inſtituto: adhibetur illi vinculum אֲסַר נֶפֶשׁ *animæ vinculum* (vt Deus ei nomen fecit) religioſa ſcilicet iuramenti affirmatio; qua nempe, illius anima quaſi conſtricta vinculo, veritatem, (non eam quidem abſolutè) ſed prout ipſam ſciuerit, crediderítue, ſanctè & ſincerè tenetur eloqui, nec contra mentem ire (quod mentiri dicimus) ſed quaſi cum Deo agat, ita cum magiſtratu agere, Dei & locum tenente, & vices gerente, & ius exigente.

Iſraëlis hoc inſtituto niti, & populi Dei, (vt nempe iuretur in reſponſa) euincunt & illa *Michææ* praxis (de qua ante mihi mentio) & verò multo aptiùs, altera illa in quæſtione de *Elia* 1.Reg.18.10. vbi cùm diſertè reſpondiſ-

sent, *non est apud nos*, non eo contentus rex, adegit eos insuper ad iuramentum, quod non inuenissent eum: quasi nulla lex cogeret, responso acquiescere hominis iniurati. Quare vt æquum omnino est, constringi reum, nè elabi denuò & statum mutare possit; vt subindè alius atque alius, atque ita (reuera) nullus sit consistendi locus: ita constringi non aut nudo responso, aut (vt alijs videtur) pecuniæ mulcta (animæ hęc vincula nō sunt, quæ sola interpres est veritatis) sed solo, vero, & vnico animæ vinculo, id est, iureiurando. Atque ita demum cardine totius causæ sic (vt par est) posito; ad illas quas nominat Apostolus βεβαιωσεις, progredi fas.

Neque verò (quod quosdam criminari audio) reum sic astrictum esse conuenit, actorem omni modo liberum. Neque verò hoc iure vtimur. sed, vt iureiurare actorem, non sanè tutum, propter, quas bis iam nominaui, causas,

Apoc. 12. 10. (& Deus ipse Satanam, quem διάβολον, id est, calumniatorem esse scit, κατήγορον, id est, accusatorem esse permittit:) ita referre tamen in codicem tenetur delationem, suámq; insuper syngraphâ fidem obligare, sub certa mulcta pecuniæ, sub certa nota infamiæ, sub precio reddendæ cessationis (vt loquitur

Exod. 22. 19. lex) ni quam suggessit, accusationem & prosequatur, & probet. Ita vtrinque cautum est; illinc iurisiurandi religione; hinc mulcta duplici, infamia nō simplici; ne aut calumniari actor, aut reus tergiuersari possit.

Iam verò iureiurare reum primò, ac dein respondere (quod nōnullos malè habet) ideò ius est; quia si iniuratus id faceret, nugatoriè faceret (nempè solutus religione) si qua in codice clausula paulò magis premeret; abnueret responsum, versaret se huc, illuc, ambages, diuerticula, cautelas quæreret; nihil aut explicitè, aut appositè, responderet. Id quod religio erit facere, postquā iuramento obstrinxit se, sanctè tum omnia, candidéq; facturum. Iniuriæ scilicet, quàm periurij reus esse malit: & damno se potiùs subijciet, quàm damnationi.

Formulam è lege petimus & sacris literis? Nulla mihi aptior ad institutum hoc videtur *Esræ* quæstione illa, Capitibus *Esræ* 9. & 10. in qua rei respondent, sed priùs iurati. Cuius totius iudicij ordo hic. Accedunt viri primarij, atq; rem referunt ad *Esram*, de inito per nonnullos (centum putà & decem) cum alienigenis cōiugio, c. 9. 1. Adigit *Esras* reos ipsos, etiam plerosq; ne reos quidē, ad iuramentū c. 10. 5. Adigit autem, in causa, in qua conuinci testibus poterant. Sed tamen primò adigit, Pòst eiusdem cap. ℣. 16. *Esras* cum reliquis, quib. delegata eius rei cura, sedent ad quæstionem habendam, quam tertio demum mense pòst effectam dederunt. Quæ forma cum *Esræ* fuerit scribæ prompti & periti in lege Dei sui; respondere poterit votis, non iniqui hominis, ad legis practicam (vt loquuntur) & instituta cognoscenda. Atque hic iurisiurandi vsus prior; iustus ac legitimus, in basi nempè litis stabilienda.

3 Alter est, cum de argumentis agitur ad fidem auspicatæ iam liti faciendam. Argumenta verò, siue βεβαιωσεις illæ, quibus Iudici fides fit; partim notæ
a sunt atque indicia (quæ rei natura fert) certa atque indubitata: partim te-
b stimonia incorrupta atque integra.

Indicia; qualia proferuntur à parentibus in causa traductæ virginis, Deut. 22. 17. Testimonia; quorum sub fide itidem, omnis actio confirmatur, Deut. 19. 15. Quorum ego in numero (testimoniorum dico) iusiurandum pono, & ipsum αὐτολογεῖν πῦρ, siue (vt loquuntur) *litis decisorium*, Heb. 6. 16. Iurisiurandi

autem

atq; ex veteri canone, *Hebræi* partes duas, seu malit quis, genera duo, fecêre. Priorem שְׁבוּעַת הָעֵרָה, i. solennem contestationem, qua quis aliorum defectu testiũ, siue qui non possint, siue qui nolint, testimoniũ ferre; Deũ ipsum vbiq; & in omnib. præsentẽ, ac ius testis habentẽ, testem aduocat. *Viuis Iehoua coram quo loquor*, contestationis formula, Iud. 8. 19. Posteriorem verò שְׁבוּעַת הָאָלָה id est, dicam execrationem, qua quis contestationi suæ fidem facit, oppignorata quasi salute sua, & abdicato, quicquid sibi in Deo aut spei, aut tutelæ est; si falsi testẽ fecerit. *Sic faciat mihi Dominus, & sic addat:* execrationis formula. 1. Sa. 14. 44. Neq; verò minus interesse putârũt Theologi, neq; minus teneri reum, siue alterutrâ vtatur, siue vtraque. Addo etiam; siue contestetur reum magistratus, aut execretur adiurando; siue ipse se, iurando. Perinde enim esse, fiat hoc, an illud: leuetur iuramentum supra reum à Iudice; an leuet ipse supra se. Idq; constare volunt tum ex *Prou. 29. 24.* ratione *Sionis*: tum ex *Iud. 17. 2.* ratione hypotheseôs. verùm lis ista aliam in litem incurrit. Non prosequor: prosequor quod institui, de argumentis.

Iam verò Iudici à Deo potestas facta, tum inquirendi criminis argumenta, tum citandi testimonia; tum deferendi iuramenta, idque ad causæ *ἐπίλυσιν* colligendas. Potestas illa fit, Deut. 13. 14. Inquires (inquit Deus) idque in genere, primò דָּרַשְׁתָּ. Cuius duas species subiungit. Primam, חָקַרְתָּ, id est, Inuestigabis, *indicia* nempè & *argumenta*. Secundam שָׁאַלְתָּ, id est, interrogabis, testes nimirum, & qui rerum gestarum conscij fuerant.

Argumenta. Sic *Iosepho* licuit manticas fratrum perscrutari, vt sublatum furto calicem deprehenderet. Gen 44. 5. Sic Magistratui nostro, ædium penetralia & recessus intimos, ad indicia sceleris eruenda. 1

Testimonia. Sic cautum est lege diuina, Leu. 5. 1. *Si vocem quis audierit adiurationis* (Paraphrastes autem *Chaldæus* legis interpres longè antiquissimus, nec ubi erretur à nobis, apposuit; nec dubium, quin de sensu veteris Ecclesiæ, etiam quæ ante Christum) *à Iudice factæ vel delatæ; & ipse eius rei testis esse possit, vt qui viderit ipse, sciuerítque* (quo loco sciuerit Septuaginta vertunt *συνειδὼς*) *si quis ita conscius ad testimonium euocatus sit: ni indicârit, feret iniquitatem suam.* Quæstionem ergo habere licet, vel sub iuramento. 2

Ac primò quidem, quæstionem habere de reo apud alios quantumuis fratres, quantumuis religiosos. sic *Obadias Eliæ*, 1. *Reg.* 18. 10. *Non est prouinciæ aut regni locus; quò nõ miserit Dominus meus quæsitum te, cúmque responderent, Non est apud nos; etiam ad iuramentum adegit prouinciam illam, quòd non inuenissent te.* Ac mihi quidem verisimile fit; cùm toti regno commune hoc iusiurandum fuerit; etiam in religiosos illos incidisse, quorum nec genua *Baali* curuata, nec ora ipsum osculata sunt: nec eos tamen hac in re (etsi in *Eliæ* sui præiudicium, etsi apud Magistratum iniquiorem) testimoniũ dicere detrectâsse. Neq; verò de reo tantùm apud alios habere quęstionem fas: sed & apud ipsum de se. Exemplo magni Iudicis in lite omnium primâ. Gen. 3. 9. *Quis indicauit tibi, nudum esse te? Et, nunquid comedisti de fructu arboris interdictæ? Sic Principes Baruchum* interrogant de libro *Ieremiæ. Indica nobis, quomodo scripseris verba hæc.* Ier. 36. 17. Sic *Esras* reos ipsos de facto suo. Esr. 10. 11. sic Pontifices à Paulo in

custodiam dato, πρόβατον τὶ ἐκφεύγειν, postulabant: Act.23 20. Fatiscunt enim sæpe accusatores (quod olim *Ethnicus* animaduertit) non omnes possunt; nonnulli nolunt accusare. Quid agimus? Quorundam scelera, quia verè opera tenebrarum sunt, nec possunt prodi: Ephe.5.11. quia *manus in manu est*, nec se volunt prodere, Prou.16.5. quia durum est *Doegi* nomen; & hoc ipsum, *prodire ad insimulandum quempiam*, frigidum atq; odiosum iam: res sumptus, periculi, infamiæ, Pro.25.8. Sinimúsne latere & scatêre scelera, & morâ vires acquirere, donec erumpant tandem ad perniciem Reip.? An quia nemo aut potest, aut vult: (perinde enim est nolit quis accusare, an non possit) interrogare datum est? Datum est certè. Atqui absque sacramento interposito interrogare, pro nihilo est. Quare & adiurandi ius fecit. Quam
* 1.Reg.22.16. vocem Spiritus sanctus in veteri * testamento, per הַשְׁבִּיעַ exprimit, sic que *Micheam* rex adiurauit: In Nouo per ἐξορκίζειν, licque Pontifex Christum Matt.26.63. & vtrique religio fuit, ad quæsita non respondere. Ac de *Hebræa* quidem voce quæstio nulla, quin & vi nominis, & vsu, iuramentum deferat. Addo nec de Græcâ. si rectè vertant *Beza* cæterique interpretes Dæmonis postulatum illud, quod est Matt.5.7. *Adiuro te, ne me torqueas*: id est, Confirma mihi iureiurando interposito, fore, vt ne me torqueas: vt illis videtur. Sed ego *adiurandi* vocem mitto. Sumo alteram, *leuandi* super reum ipsum, *iuramenti* (si altera modò sit) id est, vel inuitum ad iuramentum adigendi, permissam in lege, vel actori. Exod.22.8. 1.Reg.8.31. Ac proin, plus etiam quàm permissam, Magistratui. Certè enim periniquo loco res foret; si cuiuis de plebe actori, exigendi à reo iuramenti potestas foret; non foret Magistratui. Si in causâ depositi id liceret, in causâ regni non liceret: si adigi quis posset ad iuramentum, non *extendisse se manum ad rem proximi sui*: adigi non posset ad iuramentum, non extendisse se manum ad pacem Reipub.: si potior illius ratio, quoad ius; qui *turbas dederit* in Ecclesia Dei, quàm illius qui *aliquid interuortit* de pecunia amici. Confer mihi hæc tantùm inter se. primò Magistratum ipsum, & actorem de vulgo quemlibet. Pòst, causam pecuniolæ cuiusdam, & causam Reipub. Dein, *depositum* illud alicubi quandoque deprehendi posse; clandestina ista colloquia non posse (nisi sic interrogare detur) abire enim in auras, impressionem post se nullam relinquere. Aut valdè me fallit animus; aut (siue personas spectes, siue res, & rerum siue momenta, siue exitus) maior hîc necessitas, maior æquitas incumbit iuramenti. Quare & interrogari reum in causa sua, ius fásque diuinum est; & id interuentu sacramenti fieri, fas quoque. Atq; hic iurisiurandi vsus posterior, iustus ac legitimus, non modò vt quæstioni status fiat ex responso rei (quod ante positum est:) sed etiam vt βεβαιώσεις quoque causæ, id est, probationum staturnina colligantur, quibus Iudici fides fiat, ad litem ex altera parte terminandam.

Possent hæc iam satis esse huic instituto; nisi quòd restet adhuc vnus (credo) aut alter, vix dignus vindice nodus: nisi quòd (vt est hoc seculum nostrum) quorundam hominum quiuis scrupulus, scopulus est. Causantur adigi hoc pacto homines ad iusiurandum infinitum; nisi antè, quæstionem habere; pòst, iuramentum deferre liceat. Eiusce rei ratio iam ante à me reddita. Nolo iam hîc recoquere. Tantum id contendo, quòd defertur ijs, de more, iuramentum, infinitatis nomine declinari non posse. Dum enim *Ieremiæ* illi,

(qui

(qui ſemper in Theologia habiti ſunt iurisiurãdi limites & quaſi fines) adhibeantur, Ier.4. 2. In *veritate, iuſtitia, iudicio*, abunde ſatis circumſcriptum eſt; nec alios ſcriptura fines aut agnoſcit, aut poſtulat. 1. *In veritate*, verè ſcilicet, 1
ne quid contrà quàm ſibi conſcius eſt, deierare cogatur. Quomodo *Micheæ* delatum eſt. 1.Reg.22.16. *Ne eloquaris mihi niſi veritatem, in nomine Domini?* Aut ſi cui magis *Paulina* placeat atteſtatio. Rom.9.1. *Veritatem dicam, per Chriſtum, non mentiar, atteſtante mihi ſimul conſcientia mea per ſpiritum Sanctum.* ſat à prima parte finitum eſt. 2. *In iuſtitia*, iuſtè ſcilicet, nempe vt, & de poſſibili 2
iuretur, de quo cauit ſeruus *Abrahæ* Gen.24.5. אוּלַי לֹא־תֹאבֶה, id eſt, *Fortaſſe non dabitur.* Ethnici quoque ipſi: *De quibus ſciam poteroq;*. Et de honeſto, de quo cauerunt illi, Eſræ 10.3. כְּתוֹרָה יֵעָשֶׂה, id eſt, *prout forma iuris exigit.* Diuus *Paulus* quoque Act.23.3. *ſecundùm id quod in lege eſt.* Sat à ſecunda parte finitum eſt. 3. *In iudicio*, id eſt, maturè (ſic enim diſtinguunt interpretes) vt ne temerè. De quo *Salomon* Eccl.5.1. Ne proferens quid coram Deo, *accelerare ore cogatur*; ſed ſpatio ad deliberandum interpoſito, ita demùm reſpondere. Hij ſunt quos iuramenti fines ſacræ litteræ agnoſcunt, nec prætereà quicquam poſtulant, vt definitum ſit. Tres iſti ſi adhibeantur: 1. *Non loquar niſi veritatem in nomine Domini.* 2. *De quibus ſciam poteroq;, & prout à me forma Iuris exigit.* 3. Sumpto tantùm ad cogitandum ſpatio: nullum ab infinitate periculum. Etſi de ſingulis quæſtiunculis non conſtet (quæ ſæpe è re naſcuntur) ſat tutus erit intra hos fines; non reſponſurus quicquam aut falsò aut temerè; nec niſi de ijs, quæ & ipſe meminerit, & lege teneatur; Nempe, quod citra iuramentum facere tenetur, id faciet. Et qui tutior eſſe vult, mihi quidem infinitam potiùs licentiam captare velle, quàm infinitum iuſiurandum declinare, videri ſolet: aut (ſcilicet) ſibi malè conſcius; aut illud, quod dicere nolo. 3

Iam verò, dum ne peccetur iureiurando, haud quicquam credo intereſt, 2
anténe promittas te dicturum iuramento *promiſſorio*; an pòſt deieres, te dixiſſe *aſſertorio*. Eodem redit; priuſquam reſpondeas, profitearis te id ſine fraude facturum, præmiſſo: an poſtquam reſpondiſti, atteſteris, te id ſine fraude feciſſe, ſubmiſſo iuramento. Dixi quidem, & dicam; Feci, & faciam; duo ſunt tempora: iuramentum idem eſt. Quare ad rem quidem, haud quicquam intereſſe puto: intereſſe tamen hoc, quod plurimum conducat hoc litibus; tum vt explicitæ ſint, tum vt expeditæ, ſi *omnium primò iuretur*. Vt explicitæ; ne (ſi reo præuaricari libeat, cum nondum ſacramento obſtrictus ſit) fluctuet lis tota, nec baſin cardinémque conſequatur. Vt expeditæ; ne (ſi nolit reus vbi reſpondit, in reſponſa iurare) eaſdem ſæpe quæſtiones iterare, atque ita actum agere, iudex cogatur. Intereſſe denique quod in illa iudicij formulâ, diuinæ legi inprimis conſentanea, & noſtræ huic quæ in dubium vocatur, quàm maximè affini: is ordo ſit; *iuramenti* primùm, dein, *quæſtionis*: Idq; ipſorum poſtulato, de quibus habita eſt quæſtio. Cùm enim de litibus expediẽdis accuratiſſimè diuina lege caueatur; neq; prior in ſcriptura mentio iudicij, vt fiat; quàm vt *citò fiat*, ne ſi diu ſit in *Fieri*, acetoſum fiat: Eſra.10.5. Exod.18.14.
rectè poſtulant illi, Eſr. 10.13. ne ſibi neceſſe ſit pro tribunali ad omnia quæſita reſpondere: longum opus eſſe, nec vnius diei. Quare poſt præſti-

tum à se loco solenni solenne iuramentum, venturos se pòst per otium, לעתים מזמנים, id est, designatis temporibus: vt in singulas facti circumstantias, virtute priùs præstiti iuramenti, inquiratur. Eadem nunc praxis apud nos; idem mos obtinet; & quidem siue consilium spectes, æquissimus; siue institutum, diuino quàm simillimus. Nam si iuramentum præcedere debeant quæstiones (cum nisi pro confessu iureiurare quemquam nefas:) certè vix vnus dies, vni causæ sufficiat, cogaturq; (quod *Iethro* factum damnauit) *astare iudicio populus à manè vsque ad vesperam.*

Vltimum id est: quod quidam (vitio mentis procul dubio) deferri sibi postulant; ne in emissum à se iusiurandum, inquiratur; Idque *Paulinæ* sententiæ fiducia; *Cuiusque contradictionis terminus, iuramentum.* Mitto, quòd id ita interpretari liceat, vt πέρας illud *status* potiùs sit, quàm exitus controuersiæ. Verùm, ne liceat; sed esto sanè. sit terminus iuramentum; at non qualecunq; tamen, aut a quocunque, quomodocunque præstitum (vix hoc sani cerebri postulatum:) verùm eiusmodi (spero) vt de eius fide nulla sit contradictio; si modo contradictio per illud terminari debeat. Quare si litem fine contradictione terminare debet; ita liquidum esse debet, vt ei nemo vel citra examen, vel pòst, aut velit, aut possit contradicere. Iusiurandum enim quoduis cuiusuis, omni inquisitione liberare velle; quid aliud est quàm periurij causam agere? quid aliud, quàm quasi signo dato, ita authoramento hoc; profligatæ fidei homines, ad scelus hoc sollicitare? Cum enim siue id actor, siue reus, seu testis præstet; eadem iuramenti religio, idem valor sit: actum est, si quis iurare in litem velit, statim causam obtineat, pòst autem, recténe iuratum an secus, inquirere nefas: Quippe *iusiurandum omnis controuersiæ terminus.* Isthuc quidem si sic detur, periuris benè sit; Cum Deo transigant si possint; certè à lege nihil metuant, nec aure luant, quod ore peccarunt. Quanto id æquius? Imò verò si bonæ fidei est iusiurandum; bis, térve, inquiratur; vel septies, si libet, semper quasi de fornace, liquidum magis, purúmq; exibit: ipsáque semper inquisitio, vberioris fidei acquisitio futura est. Sin non bonæ, vel dubiæ fidei sit, vel suspectæ; inquiratur, & tum; quò *iniusta vincula rumpat iustitia.* Ratio quidem hæc, ratió-ne sola? Nónne & lex eadem dicit? Siue quis in sua causa pro se, seu in aliena contra alium, sacramento contendat. Pro se: suspectæ pudicitiæ mulier cum eiurasset adulterium dira execratione sui ipsius: nunquid dimissa statim? (*finis námque omnis controuersiæ iusiurandum*) imo vero recténe iurata an secus, quæstio noua. Cui rei, ebibendas habuit aquas amaras, iuramenti sui, vel veri indices, vel falsi vindices futuras. Num. 5. 24.

Contra alium. Cum enim statam rem fore cauisset lex ex ore duorum triúmve testium, qui iurati testimonium dixissent in quempiam, Deut. 19. 16. ne quis humana testimonia quasi diuina oracula haberet; proximo versu edicit, sisti tamen posse denuò testem suspectum; & inquiri adeò, an castè integréq; versatus fuerit in testimonio ferendo: sin falsi conuictus fuerit, eodem prorsus supplicio afficiendum fore, quo fuerat is, quem reum peregerat. Sed ego peccem in tempus, etiam in templum quoque (cuius nos iampridem vox auocauit) si vlteriùs insecter hasce ineptias, quas quiuis cum volet, obterere poterit argumentis, ita suâ sponte diffluunt. Reddo igitur vos vobis, & concludo.

Heb. 6, 16.

Si (vt ait propheta) disponatur iudicium hoc, (quo vtimur) ad lineam; & iustitia

Iſ. 28. 17.

iuſtitia hæc ad perpendiculum verbi diuini; nuſquam in ijs peccari: Exigere poſſe magiſtratum, ídque à reo, (præſertim dum ne capitalis cauſa ſit, aut ſanguinaria) iuſiurandum ſuum: ídque eouſque poſſe, ſiue vt his baſin ſuam obtineat, dum ſtatus quæritur: ſiue vt probationum veritas eluceſcat, dum quæſtio habetur. Neque verò iuramenti aut fines, aut ordinem, aut examen peccare in Theologiam: ac proin detrectari non poſſe. Qui detrectant; primùm inſcitia diuini iuris id facere: periculoſo dein exemplo, ſi ſic liceat animi gratia, in iudicia publica, ſine iudicio inquirere; ſi cæteras regni res, momentáq; reipub.; denique ius ipſum (ſi pro nobis non faciat,) in ius vocare. Quod auertat à nobis Deus opt. max. ad quem conuerſi precemur, vti det nobis *modeſtè ſapere, & ſentire in omnibus*, cernere animis quàm non religioſum ſit, quàm non Chriſtianum, inclinare iudicia gentis noſtræ: quin ea potiùs quæ remp. nóſque omnes ſuſtentant, omni conatu noſtro, omnibus ingenij neruis ac viribus ſuſtentare. Proximè enim poſt Deum, Deíque cultum; veriſſimum eſt *Elihu* verbum: Duo hæc, *iuſtitiam ac iudicium, ſuſtentare omnia.* Iob 36.17.

Atque ita determinata mihi ſit lis iſta, atque vtinam etiam terminata.

Faults eſcaped.

In the Epiſtle to the Reader.

In B.j. in the 9. line, for honour reade hauour. In the next leaſe afore D. line 19. for imploying: read implying.

In the 1. part.

Pag. 3. quotation 3. for ca. 4. read 8. Pag. 27. lin. 13. betwixt the worde *thoſe*, and the worde *opinions*, adde *great*. Pag. 35. line vlt. in ſteede of *for tithes*, read, *from paying tithes*. Pag. 37. lin. 4 after the worde *three*: adde theſe, *needs be paide*. Pag 41. lin. 21. for *it*, read *in*. Pag. 50. lin. 2. for *And*: reade *At*. Pag. 53. lin. 23. after *his*: adde, heires. Pag. 65. lin. 22. betwixt the words *otherwiſe* and *doth*, adde *And*, Pag. 72. lin. 19. for *cauſes*, read *cauſe*. Pag. 73. lin. 8. for *euidenc*, reade *euidence* In the twelfth Chapter in moſt places where it is *goods and chattels*: reade *debts and chattels*. Pag. 85. the quotation ſhould be referred to the 28. line. Pag. 88. lin. 29. for *therefore*, read *thereof*. Pag. 108. lin. 14. and pag. 109. lin. 15. for *10. Eliz.* reade *primo*. Pag. 110. lin. 29. after this worde *Lawe*, adde theſe, *if ſhe ſo did*, and blot them out of the beginning of the next ſentence. Pag. 122. lin. 24. for *the*, read *that*. Pag. 126. lin. 31. after this worde *king*, adde theſe, *is not*. Pag. 127. lin. 34. for *de drawne*, read *be drawen*.

In the 2. part.

Pag. 2. lin. 11. for *thoſe*, read *thoſe*. Pag 4. lin. 13. for *practices*, read *practice*. Pag. 15. lin. 14. for *wrouſully*, read *wrongfully*. Pag. 34. lin. 27. for *euer* read *euen*. Pag. 35. lin. penult. put out the firſt *a*. Pag. 36. lin. 2. for *perſecuter*, read *proſecutour*. Pag. 43. lin. 31. for *proceede*, reade *proceeds*. Pag. 45. lin. 24. for *or*, reade *no*. Pag. 87. lin. 11. for *retaliatio*, read *retaliation*. pag. 92. lin. 14. and 16. for *Camperell*, read *Camperell*. Pag. 96. lin. 28. for M. in the quotation, reade T. but the whole caſe it ſelfe, was miſtaken by me. Pag. 100. quotatione 7. make it thus, *Vide 3. part. c. 8.* Pag. 100. lin. 17. for *ipſam*, read *ipſum*. Pag. 107. lin. 4. & 23. for 1. H. 4. reade 2. H. 4. Pag. 110. lin. 9. betwixt *be*, and *one*, adde *but*. Pag. 127. lin. penult. for *Accuſer*, read *Accuſers*. Pag. 134. lin. 30. for *Enquire* read *Enquirie*.

In the 3. part.

Pag. 11. lin. 3. for *that*, reade *of*. Pag. 65. lin. 14. for *Pine*, reade *Pine*. Pag. 75. and ſo on, is quoted for 73. &c. Pag. 81. lin. penult. put out *that*. Pag. 109. lin. 14. for *thoſe*, reade *thoſe*. Pag. 114. lin. 33. for *benfice*, read *beneſice*. Pag. 120. lin. 9. for *polticie*, read *politie*. Pag. 123. lin 25. for *deuied*, read *deuiſed*. Pag. 165. lin. 21. for *temporell*, reade *temporall*. Pag. 172. lin. 4. for *will*, reade *wel*. Pag. 184. lin. 19. theſe letters T. C. ſhould be in the margent. Pag. 186. lin. 29. for *ouerthowe*, read *ouerthrowe*. Pag. 201. lin. 6. for *certifie*, reade *teſtifie*.